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NO. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHRISTI HAAS, as parent and
natural guardian of SCOTT M. GLENN, II,
Petitioner,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Social Security Act violate an illegitimate child's right to the equal protection of the laws when it conditions the child's eligibility for survivors' benefits on the child's ability to satisfy a state law requiring illegitimate children to file a paternity claim no later than five months after the putative father's death, even when the child is not born until after that time has expired?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were Christi Haas, as parent and natural guardian for Scott M. Glenn, II, and Shirley S. Chater, Commissioner of Social Security.

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Francis X. Clines, *Clinton Signs Bill Cutting Welfare*, The New York Times, Aug. 23, 1996, at A1 23
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Carl Horowitz, *The Scary Jump in Teen Births*, Investor's Business Daily, Aug. 29, 1996, at A1 23
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PETITION FOR A WRIT OF CERTIORARI

Christi Haas, as parent and natural guardian of Scott M. Glenn, II, respectfully petitions for a writ of certiorari to review the judgment of the *en banc* United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the district court by an equally divided *en banc* court, is noted at 89 F.3d 838. It is reprinted at page 1a of the appendix to this petition. The court of appeals' order granting rehearing *en banc* is unpublished and reprinted at page 47a of the appendix. The original panel opinion of the court of appeals is published at 79 F.3d 559 and reprinted at pages 2a-26a. The memorandum of decision and order of the United States District Court for the Northern District of Indiana is unreported. It is reprinted at pages 27a-36a of the appendix. The decision of the administrative Appeals Council denying the request for review of the decision of the administrative law judge is unpublished and reprinted at pages 37a-39a. The unpublished decision of the administrative law judge is reprinted at pages 40a-44a, and the unpublished decision of the Social Security Administration is reprinted at pages 45a-46a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 18, 1996. On September 5, 1996, Justice Stevens extended the time for filing a petition for certiorari to and including October 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Pursuant to 28 U.S.C. § 2403(b), the *en banc* court of appeals notified the Indiana Attorney General that this case drew the constitutionality of an Indiana statute into question and invited the Attorney General to submit a brief. Order (May 16, 1996). Since 28 U.S.C. § 2403(b) may apply, petitioner has served a copy of this petition on the Indiana Attorney General under this Court's Rule 29(4)(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of the federal Social Security Act, 42 U.S.C. §§ 402 and 416, and Indiana's intestate succession law, Ind. Code § 29-1-2-7(b), are set out in the appendix at pages 49a-52a.

STATEMENT

This case presents an equal protection challenge to the incorporation of Indiana's intestate succession statute into the federal Social Security Act, which results in the denial of survivors' benefits to illegitimate children born after the deaths of their insured fathers.

Scott M. Glenn, II ("Scotty") was born out of wedlock more than eight months after his father died. His father, wage earner Scott M. Glenn ("Glenn"), died in an car accident on March 3, 1992; Scotty was born eight months later, on November 6, 1992. App. 27a. Scotty's parents were never married. App. 3a. Shortly after Scotty's birth, his mother, petitioner Christi Haas (who was still a minor when Scotty was born),[1] sought and obtained a paternity decree from an Indiana state court establishing that Glenn was Scotty's father. App. 3a, 27a-28a. She then

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[1] *See* Administrative Record of Department of Health and Human Services at 32, Exhibit 2 (Request to Be Selected as Payee) (giving mother's date of birth as February 15, 1975).

applied for survivors' benefits for Scotty under the Social Security Act. App. 28a. The administrative law judge "acknowledged that there was satisfactory evidence of [Glenn's] paternity but nevertheless denied the application for benefits." App. 4a, 43a. The Commissioner of Social Security[2] affirmed and held that Scotty was not eligible for benefits under the Social Security Act provision incorporating Indiana's intestate succession law because Scotty had not filed a paternity action within five months of Glenn's death, even though Scotty had not even been born at that time. App. 4a, 38a.

Under the Social Security Act, the "dependent child" of a wage earner insured under the Act is entitled to "child's insurance benefits" if the wage earner dies. *See* 42 U.S.C. § 402(d). These benefits are designed to replace the support a child loses when a parent dies, *Mathews v. Lucas*, 427 U.S. 495, 507 (1976) (quoting S. Rep. No. 404, 89th Cong. 1st Sess., 110 (1965)), so the Act requires that the child be dependent on the deceased parent's support. Legitimate children are all deemed to be "dependent," as are adopted children. 42 U.S.C. § 402(d)(3). Illegitimate children, however, are deemed "dependent" only if they meet one of the statutory presumptions of dependency. A child is presumed to be dependent if:

(1) the child would be entitled to inherit from the wage earner under the law of intestate succession of the wage earner's state of domicile;

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[2] The 1994 amendment to the Social Security Act changed all references to the "Secretary of Health and Human Services" to the "Commissioner of Social Security" and all references to the "Department of Health and Human Services" to the "Social Security Administration." Social Security Independence and Program Improvements Act of 1994, Pub. L. 103-296 § 107, 108 Stat. 1464, 1476. For consistency, petitioner will use "Commissioner of Social Security" and "Social Security Administration" even where the actual party under the prior law was the Secretary or the Department.

(2) the child's parents went through a marriage ceremony that would have been valid but for a technical deficiency;

(3) during the wage earner's lifetime, the wage earner acknowledged his paternity of the child in writing;

(4) during the wage earner's lifetime, a court issued a decree that the wage earner was the child's father;

(5) during the wage earner's lifetime, a court ordered that the wage earner contribute to the support of the child because the wage earner was the child's parent; or

(6) the Commissioner of Social Security determines both that the wage earner was the child's parent and that he was living with or contributing to the support of the child at the time of his death.

Mathews, 427 U.S. at 498-500; 42 U.S.C. §§ 416(h)(2), (3)(C). If none of these presumptions of dependency apply, illegitimate children must prove actual dependence by showing that the wage earner was living with them or contributing to their support at the time of his death. *See* 42 U.S.C. § 402(d)(3).

As a practical matter, most of these options are not available to illegitimate children conceived shortly before their fathers' deaths. When a man dies shortly after conceiving a child, he has little or no opportunity to marry or begin living with the mother, execute a written acknowledgment of the child, or contribute to the child's support,[3] just as the mother has little or no opportunity to obtain a court order of paternity or support before the wage earner dies. Thus, there is often no way for an

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[3] When, as here, the father dies so soon after conception that there is as yet no need for such support, there is no way for the child to demonstrate actual dependency under 42 U.S.C. § 402(d)(3). *Orsini on behalf of Orsini v. Sullivan*, 903 F.2d 1393 (11th Cir. 1990) (when father died one week after conceiving child, child could not prove actual dependency for purposes of the Act), *cert. denied*, 498 U.S. 1024 (1991).

illegitimate child conceived shortly before his father's death to establish dependency except by the presumption based on the right of intestate inheritance. As Chief Judge Posner noted in writing for the panel majority below, this was the only road open to Scotty. App. 3a.

Since Glenn was domiciled in Indiana at the time of his death, Scotty's eligibility for insurance benefits under the Social Security Act depended on whether Indiana's law of intestate succession would allow him to inherit from Glenn. Indiana's intestacy statute allows a child born out of wedlock to inherit from his father only if (1) the child's paternity is established by law in an action filed within the father's lifetime or within five months after the father's death, or (2) the father marries the mother and acknowledges the child to be his own. Ind. Code § 29-1-2-7(b). Indiana courts provide no exception to this law for posthumous children like Scotty. *S.V. v. Estate of Bellamy*, 579 N.E.2d 144, 145 (Ind. Ct. App. 1991) (upholding Indiana's intestacy statute against equal protection challenge by posthumous child).

Scotty's time for establishing paternity under Indiana's intestacy law thus expired three months before he was born. Although Scotty's mother filed a paternity action in state court just one month after he was born, that was still four months too late for the Indiana intestacy statute. Even though the state court in the paternity action ruled that Glenn was Scotty's father under Indiana law, App. 3a, 14a, 41a, and even though the same court later ruled that Scotty is Glenn's "dependent child" for the purposes of Indiana's wrongful death statute, App. 14a, the Commissioner of Social Security concluded that Indiana's intestacy statute would bar Scotty from inheriting from Glenn — and thus barred him from proving his eligibility for Social Security survivors' benefits. App. 38a.

After exhausting her administrative appeals, App. 28a, petitioner Christi Haas filed a complaint on Scotty's behalf in the United States District Court for the Northern District of Indiana, requesting review of the final decision of the Commissioner under 42 U.S.C. § 405(g). Compl. § I, at 1. Relying on this Court's

decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), the district court upheld the Commissioner's decision to deny Scotty's application for benefits against petitioner's constitutional challenges. App. 33a-35a. Petitioner appealed.

A divided panel of the Seventh Circuit affirmed. The panel majority upheld the constitutionality of both Indiana's intestacy statute and its incorporation into the Social Security Act. Writing for himself and Senior Circuit Judge Bauer, Chief Judge Posner reasoned that as long as the Indiana intestacy statute was constitutional, its application through the Social Security Act was also constitutional. App. 11a.

The panel held that the Indiana intestate succession law was constitutional under this Court's plurality decision in *Lalli v. Lalli*. In *Lalli*, an adult son who was denied a share of his father's estate challenged the constitutionality of a state intestacy statute requiring an illegitimate child to establish paternity during the father's lifetime. A three-Justice plurality upheld the state intestacy law as substantially related to the State's interest in the orderly disposition of estates. 439 U.S. at 275.[4] The panel here concluded that, since the statute upheld in *Lalli* required an illegitimate child to establish paternity within the father's lifetime, the Indiana statute, which allows five more months, must also be constitutional — despite its application in this case to an unborn, rather than an adult, son. The panel admitted that it could "not be certain that *Lalli* . . . would come out the same way had the facts been as in the present case," App. 8a, and it noted that Indiana's law might be unconstitutional if applied in circumstances that made it "impossible" for a child to establish paternity. But the panel concluded that it was not "impossible" for posthumous children to establish paternity, since an interested person could

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[4] Two Justices who would have preferred a return to a lower level of scrutiny for discrimination claims by illegitimate children concurred in the result reached by the three Justices. *Lalli*, 439 U.S. 276. Four members of the Court disagreed that the law was substantially related to the State's interest. *Id.* at 277.

file a paternity suit on a child's behalf before the child is born, even though "[i]t might not occur [to anyone] that a paternity suit could be, let alone that it must be, brought *before* the birth of the child whose paternity was to be determined." App. 7a. The panel therefore held that Indiana's intestate succession law was constitutional even as applied to children like Scotty.

Once it determined that the Indiana statute was constitutional, the panel majority refused to consider the separate question of whether the Social Security Act's use of the Indiana statute to determine benefit eligibility for posthumous illegitimate children was also constitutional. Chief Judge Posner suggested that this Court's decision in *Mathews v. Lucas*, 427 U.S. 495, which upheld the Social Security Act's use of presumptions to establish dependency, precluded any consideration of whether the application of those presumptions was constitutional. App. 10a-11a. As the panel dissent noted, however, *Mathews* did not address whether the application of the presumption of dependency based on intestate succession was constitutional, especially in circumstances such as those presented here. App. 17a.

Because the panel determined that *Mathews* foreclosed consideration of the constitutionality of the Act's incorporation of the Indiana intestacy statute for purposes of establishing entitlement to survivors' benefits, the panel declined to follow the Eleventh Circuit's lead in analyzing the constitutionality of Commissioner's denial of such benefits under the framework that this Court established in cases after *Lalli*. App. 11a (criticizing *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992)). The panel majority acknowledged that this Court has repeatedly held that requiring a child born out of wedlock to establish paternity within the first few years of his life in order to obtain parental support is a violation of equal protection. App. 11a-12a (citing *Mills v. Habluetzel*, 456 U.S. 91 (1982) (invalidating one-year limit on establishing paternity for support purposes), *Pickett v. Brown*, 462 U.S. 1 (1983) (invalidating two-year limit), and *Clark v. Jeter*, 486 U.S. 456 (1988) (invalidating six-year limit)). The majority also acknowledged that the interest at stake in this case was providing support to dependent children of deceased wage

earners, not "the policy of protecting estates." App. 8a. Despite its concession that the state interest that supported the result in *Lalli* was "not in play," App. 8a, the panel nonetheless held that *Lalli* was controlling. App. 12a. The panel concluded that "the combined effect of *Lalli* and *Mathews* is to place [children in Scotty's position] in a box. . . . Only the Supreme Court possesses the key that will open the box." App. 12a-13a.

In a strong dissent, Judge Diane P. Wood observed that the panel's decision to uphold the Commissioner's denial of benefits "conflicts both with the Supreme Court's decisions . . . and with the decisions of the Court of Appeals for the Eleventh Circuit." App. 13a. First, she showed that the majority extended the plurality opinion in *Lalli* far beyond its reach, noting that "[i]n every case dealing with illegitimacy since *Lalli*, the Supreme Court has struck down state statutes that impose unrealistic burdens on children attempting to establish paternity for suc purposes." App. 13a, 18a. Judge Wood then demonstrated that the case was controlled not by *Lalli*, but by this Court's decisions in *Mills*, *Pickett*, and *Clark*, all of which sustained equal protection challenges to statutes imposing unreasonably short time limits on a child's ability to establish paternity for such purposes. App. 19a-22a.

Using the analytical framework established in those cases, Judge Wood concluded that a time period for asserting a paternity claim that expires before the child is born does not present a "reasonable opportunity" to assert the claim. *Mills*, 456 U.S. at 99. She reasoned that *Mills*, *Pickett*, and *Clark* were also dispositive on the issue of whether the Indiana statute's five-month time period is substantially related to the State's interest in preventing stale or fraudulent claims, *id.* at 100, since this Court had held that that interest did not justify even longer time limits. App. 23a. Finally, she determined that the five-month limit did not substantially further the speedy disposition of estates since the average time for wrapping up an intestate estate is usually between eighteen to twenty-four months. App. 24a. Judge Wood therefore concluded that the Indiana statute was unconstitutional as applied to posthumous illegitimate children. App. 25a.

In recognition of the importance of this case, the court of appeals granted rehearing *en banc*. App. 47a. Pursuant to 28 U.S.C. § 2403(b), the court invited the Indiana Attorney General to submit a brief on the constitutionality of Indiana's intestate succession law, but she did not do so before the disposition of the case.[5] After hearing oral argument, the *en banc* court divided equally and thus affirmed the district court without opinion. App. 1a.

REASONS FOR GRANTING THE WRIT

As the government itself has acknowledged, "[t]he issues raised by this case are important"[6] — namely, whether the Social Security Act violates equal protection by denying survivors' benefits to illegitimate children, like Scotty here, because state law required them to sue to establish paternity before they were born. The majority and dissenting opinions of the panel below explain why this Court's criteria for certiorari are amply satisfied in this case. Chief Judge Posner, writing for the panel majority, recognized that this application of the Social Security Act produces a harsh result by "plac[ing] claimants in the position of young Scott in a box," App. 12a; he added, however, that "[o]nly the Supreme Court possesses the key that will open the box," App. 13a, given the majority's view that the case is controlled by *Lalli v. Lalli*, 439 U.S. 259 (1978). In dissent, Judge Wood countered that the relevant authority of this Court is not *Lalli*, which sustained a time limit for establishing paternity for purposes of intestate succession, but a line of subsequent cases invalidating time limits for establishing paternity for purposes of parental support; hence, she argued, the judgment below

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[5] Order (May 16, 1996); Motion of Attorney General of Indiana for Leave to File a Post-Argument Brief (June 10, 1996); Order Granting Motion of Attorney General of Indiana for Leave to File a Post-Argument Brief (June 13, 1996).

[6] Affidavit of Frank A. Rosenfeld, Attorney, United States Department of Justice, supporting Government's Motion for an Extension of Time to Respond to Petition for Rehearing *En Banc*, at 2.

"conflicts both with the Supreme Court's decisions in *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988), and with [two] decisions of the Eleventh Circuit." App. 13a. The Seventh Circuit granted rehearing *en banc* to resolve whether *Lalli* or *Mills* applies, but ultimately found itself equally divided, and therefore affirmed the denial of benefits based on *Lalli*. This Court's guidance is needed to clarify which of its two lines of authority is applicable in these circumstances and to resolve the conflict between the decision below and the decisions of the Eleventh Circuit.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The Seventh Circuit has allowed the federal government to condition an illegitimate child's eligibility for Social Security survivors' benefits on the child's filing a paternity suit before his or her birth, even though similarly situated legitimate children need not do anything in order to obtain survivors' benefits. As Judge Wood recognized, this result is inconsistent with the rationale of this Court's decisions in *Mills*, *Pickett*, and *Clark*, each of which holds that an illegitimate child's right to equal protection is violated if, in order to obtain parental support, the child must sue to establish paternity within the first few years of his or her life.

This principle was first established in *Mills*, 456 U.S. 91. This Court had made clear even prior to *Mills* that "a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children." *Id.* at 97 (citing *Gomez v. Perez*, 409 U.S. 535 (1973)). In *Mills*, the Court began to answer the question of how equal that opportunity must be. *Mills* involved a Texas statute that imposed a "less than generous" one-year statute of limitations for suits by illegitimate children to identify their natural fathers for purposes of obtaining support. *Id.* at 94. No such limitation was imposed on parental support suits by legitimate children.

In *Mills*, the Court applied the "intermediate" equal protection scrutiny applicable to classifications based upon illegitimacy.[7] This intermediate standard reflects the recognition that, although illegitimate children possess many of the same characteristics of the classes subject to "strict" equal protection scrutiny, *see Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972), the government is sometimes justified in treating illegitimate children differently than legitimate children. This is most often so where an illegitimate child is seeking to enforce a right to support or inheritance from his or her natural father; in such circumstances, the government may require proof of paternity, which need not be required of legitimate children, whose paternity is rarely disputed. *Mills*, 456 U.S. at 97-99. The *Mills* Court thus held that statutes, such as the Texas statute, that impose time limitations on support claims brought by illegitimate children, but not those brought by legitimate children, may withstand intermediate equal protection scrutiny if, but only if, a two-pronged standard is satisfied:

> First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such [illegitimate] children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.

Id. at 99-100. Although a statute's failure to satisfy either prong would be fatal, the Court held that the Texas statute failed both prongs.

With regard to the first prong, the Court concluded that an unwed mother could not reasonably be required to bring a paternity suit within the first year of her child's life. The Court

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[7] "Intermediate" equal protection scrutiny requires that a classification be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. at 461.

recognized that "[f]inancial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth." *Id.* at 100.

With regard to the second prong, the Court concluded that the one-year limitation period was "not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims." *Id.* at 101. The Court could "conceive of no evidence essential to paternity suits that invariably will be lost in only one year"; nor could the Court discern why "the passage of 12 months will appreciably increase the likelihood of fraudulent claims." *Id.* Hence, even though the Texas statute did not make it "impossible" for illegitimate children to establish their rights to parental support, the Court held that the statute "so restrict[ed] those rights as effectively to extinguish them," and therefore denied illegitimate children the equal protection of the laws. *Id.*

Five Justices joined a second opinion in *Mills* to emphasize that the Equal Protection Clause could be violated even by more "generous" time limits for illegitimate children to file parental support claims, such as the four-year statute then being used in Texas for paternity suits. Justice O'Connor, writing for the concurring Justices, noted that the practical obstacles to filing suit within a year could often exist for several years after an illegitimate child's birth, particularly when the mother is herself a minor. *Id.* at 105 & n.4 (O'Connor, J., concurring). The concurrence also questioned the strength and sincerity of the State's asserted interest in preventing stale and fraudulent claims — both because the State allowed other types of civil actions to be tolled during a child's minority, and because the State had a countervailing interest in ensuring that genuine claims are satisfied so that children are adequately supported. *Id.* at 103-05 & n.3 (O'Connor, J., concurring).

The concurrence foreshadowed two subsequent decisions of this Court, both of which held that even longer limitations periods

did not satisfy the two-pronged *Mills* standard. In *Pickett*, 462 U.S. 1, a unanimous Court invalidated, on equal protection grounds, a Tennessee statute that required paternity suits to be filed within two years of an illegitimate child's birth. And in *Clark*, 486 U.S. 456, the Court struck down a Pennsylvania statute that imposed a six-year limitation on the filing of paternity actions by illegitimate children. Once again unanimously, and once again applying the analytical framework established in *Mills*, the Court observed that "[e]ven six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child." *Id.* at 463. And in any event, said the Court, the state's asserted interest in preventing stale and fraudulent claims was entitled to little deference, given that the state permitted paternity actions to be brought at any time for purposes other than obtaining parental support. *Id.* at 464.

Mills, *Pickett*, and *Clark* differ from this case in only one respect: those cases involved time limits on an illegitimate child's ability to obtain support from the father himself, whereas this case involves a time limit on an illegitimate child's ability to obtain support under the Social Security Act as the father's survivor. But there is no reason why the reasoning of *Mills*, *Pickett*, and *Clark* should not also apply in the present context. Indeed, the Court has elsewhere recognized that "the same principle" underlying those cases — that "a judicially enforceable right on behalf of children to needed support" cannot be denied to a child "simply because its natural father has not married its mother" — also "applies when the judicially enforceable right to needed support lies against the Government rather than a natural father." *Mathews*, 427 U.S. at 507.

As the panel dissent recognized, under the reasoning of *Mills*, *Pickett*, and *Clark*, the Social Security Act's incorporation of Indiana's statute of limitations denies equal protection to illegitimate children like Scotty. If the one-, two-, and six-year statutes of limitations in *Mills*, *Pickett*, and *Clark* violated the equal protection rights of illegitimate children, then *a fortiori* so does the five-month statute of limitations that the Social Security Act imposes on illegitimate children in Indiana. That is

particularly so in circumstances, such as those here, where the statute of limitations expires before the child is even born.

Under the first prong of the *Mills* analysis, the Social Security Act's incorporation of the Indiana intestacy statute fails, at least as applied to posthumous illegitimate children. This statutory scheme does not provide a period for seeking support of such children that is "sufficiently long in duration to present a reasonable opportunity" for the mother or other close relative to assert claims on their behalf. *Mills*, 456 U.S. at 99. It is particularly unreasonable to expect a mother to file a paternity suit in the months before (or even soon after) giving birth when she must cope not only, as in *Mills* and its progeny, with "the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock," *id.* at 97, but also with the emotional and economic loss often associated with the death of the child's father.[8]

Nor is the second prong of the *Mills* analysis satisfied here. To be sure, "problems of proof in paternity suits" — especially, perhaps, when the putative father is dead — "'are not to be lightly brushed aside.'" *Id.* at 101 (quoting *Gomez*, 409 U.S. at 538). But there is no reason to conclude that "evidence essential to paternity suits," even those involving deceased fathers, "invariably will be lost in only [five months]." *Id.*[9] There is

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[8] All of these difficulties are compounded when the mother is a minor, as was Scotty's mother and as are the mothers of 13% of the illegitimate children born each year. Cheryl Wetzstein, *Congress Looks for Teen-Pregnancy Solutions*, Washington Times, Aug. 13, 1996, at A2; *see Mills*, 456 U.S. at 105 n.4 (O'Connor, J., concurring) ("[t]he problem [of filing a prompt paternity action] may be exacerbated if, as often happens, the mother herself is a minor").

[9] Indeed, this Court has noted that "increasingly sophisticated" paternity tests, *Clark*, 486 U.S. at 465, have "alleviated the problems of proof surrounding paternity actions." *Pickett*, 462 U.S. at 17. Genetic testing has now advanced to the point where paternity can be established by reconstructing a deceased father's "DNA . . . by testing both paternal

likewise no reason to conclude that the passage of five months from the father's death "will appreciably increase the likelihood of fraudulent claims." *Id.*[10] Any asserted federal interest in "avoiding the litigation of stale or fraudulent claims," *id.* at 99, is undercut by the Social Security Act's incorporation of other states' statutes allowing their illegitimate children longer periods of time in which to establish paternity. *See Clark*, 486 U.S. at 464 (state's asserted interest in avoiding stale and fraudulent claims is undermined by state's use of longer limitations period to establish paternity in other contexts); *Mills*, 456 U.S. at 104-05 (O'Connor, J., concurring) (same).

The district court, the panel majority, and presumably half of the *en banc* court viewed *Mills, Pickett,* and *Clark* as inapposite, however, and instead relied on the Court's earlier plurality opinion in *Lalli,* 439 U.S. 259. In *Lalli*, the Court rejected an equal protection challenge to a New York statute that required illegitimate children seeking to inherit from their fathers to provide proof that a court had made a paternity determination "during the lifetime of the father." 439 U.S. at 261-62 (quoting

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grandparents." Jennifer Goodin, *DNA Parentage Testing Labs Hot in Tri-State*, Cincinnati Business Courier, July 8, 1996, at C2. In fact, DNA tests have become so foolproof that the recent welfare reform law signed by President Clinton requires states to abolish jury trials for paternity suits, since they are "cumbersome, expensive, and unnecessary." John Voskuhl, *Welfare Bill May Force State to Change Its Constitution*, The Courier-Journal, Aug. 30, 1996, at A1.

[10] Many states address the problem of stale or fraudulent claims by requiring a child who brings a paternity action after the father's death to demonstrate paternity by clear and convincing evidence. *See, e.g.*, Ala. Code § 43-8-48(2)(b); Del. Code Ann. tit. 12, § 508(2)(b); Idaho Code § 15-2-109(b)(2); 755 Ill. Comp. Stat. 5/2-2(h); Me. Rev. Stat. Ann. tit. 18, § 2-109(2)(iii); Mo. Rev. Stat. § 474.060(2); N.H. Rev. Stat. Ann. § 561:4(II)(d); Tenn. Code Ann. § 31-2-105(a)(2)(B); Utah Code Ann. § 75-2-109(2)(b) (all allowing intestate succession of illegitimate child if paternity is established after father's death by clear and convincing evidence).

statute). The plurality reasoned that the statute was substantially related to the government's interests in facilitating the administration of estates and ensuring the accurate resolution of paternity claims. *Id.* at 271.[11]

This reliance on *Lalli* was misplaced. This is not a case, as was *Lalli*, about the inheritance rights of illegitimate children under state law. It is, instead, a case about illegitimate children's rights under federal law to benefits designed to replace the support that they could have received from their fathers (*e.g.*, the sort of parental support involved in *Mills*, *Pickett*, and *Clark*). The central issue in this case is thus not — as the district court, the panel majority, and half of the *en banc* Seventh Circuit seemed to assume — whether the Indiana intestacy statute is itself constitutional as an intestacy statute. It is, rather, whether the Social Security Act is constitutional to the extent that illegitimate children are denied survivors' benefits because they did not sue to establish paternity within the time limits imposed by the Indiana statute.[12]

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[11] The plurality sought to distinguish *Trimble v. Gordon*, 430 U.S. 762 (1977), which struck down a state law that "effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their patents." *Lalli*, 439 U.S. at 273. The plurality noted that New York's courts had interpreted the statute of limitations in *Lalli* "liberally and in such a way as to enhance its utility to both father and child," such as by allowing fathers to waive defenses in paternity proceedings or by excusing "technical" failures to comply with the statute in appropriate circumstances. *Id.* Justice Brennan, joined by Justices White, Marshall, and Stevens, dissented, finding the case indistinguishable from *Trimble*.

[12] As the government now concedes, to the extent that a state intestacy statute such as Indiana's is unconstitutional, the incorporation of that statute into the Social Security Act is also unconstitutional. *Lawrence on Behalf of Lawrence v. Chater*, 116 S. Ct. 604, 605 (1996). We submit that the unconstitutionality of the state statute is a sufficient, but not a necessary, condition for the unconstitutionality of the incorporation of that statute into the Social Security Act. Accordingly, although the

The failure to recognize this distinction led the courts below to focus on the wrong governmental interest in assessing whether the disparate treatment accorded illegitimate children like Scotty was justified. The State of Indiana's interest in protecting decedents' estates — an interest that concededly was "not in play" in this case, App. 8a, — became the justification for a *federal* statutory scheme discriminating against illegitimate children.[13] But the federal government cannot bootstrap on such a uniquely local interest to justify the constitutionality of a federal statute. *Cf. United States v. Lopez*, 115 S. Ct. 1624 (1995). The inquiry should have turned on whether any "important" interest of the federal government itself was "substantially" advanced by the Social Security Act's conditioning of an illegitimate child's right to survivors' benefits on his or her filing a paternity suit within the short time allowed by the Indiana statute. *Clark*, 486 U.S. at 461. No federal interest, much less an "important" one, has been offered in this case. Indeed, it is difficult to imagine any federal interest that could be deemed sufficiently important to justify denying illegitimate Indiana children — but not legitimate children, and not illegitimate children in those states whose intestacy statutes contain no limitations periods — any opportunity during their lifetimes to obtain the sort of state court

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Court might appropriately use this case as a vehicle for overruling or limiting *Lalli* (given the substantial questions noted by Chief Judge Posner regarding the constitutionality of the Indiana statute even in the inheritance context), the Court need not even consider the constitutionality of the Indiana statute, standing alone, to hold that its incorporation into the Social Security Act violates equal protection.

[13] The panel majority's analysis closely tracked the constitutional analysis of the Indiana Court of Appeals in *Estate of Bellamy*, 579 N.E.2d 144, which involved an equal protection challenge to the inheritance statute *qua* inheritance statute. The Indiana Court of Appeals found the *Mills* line of cases inapposite, and instead relied upon *Lalli* to uphold the statute, because of the differences in the governmental interests involved in the inheritance setting and the child-support setting. 579 N.E.2d at 147-48.

determination of paternity that they need in order to obtain Social Security survivors' benefits.

In sum, the central question here is whether Congress's decision to incorporate the Indiana intestacy law, along with the similar statutes of other states,[14] into the Social Security Act so restricts the opportunity of illegitimate children like Scotty to obtain the support granted to legitimate children that the opportunity is, in reality, an illusory one. We submit that this question should be controlled by this Court's decisions in *Mills*, *Pickett*, and *Clark*, and not, as the courts below concluded, by *Lalli*. Certiorari is warranted to establish which of these lines of cases controls the equal protection inquiry under the Social Security Act and to further establish that the constitutionality of federal statutes must be justified with reference to federal interests.

II. THE DECISION BELOW SQUARELY CONFLICTS WITH THE DECISIONS OF THE ELEVENTH CIRCUIT

As the panel dissent observed, the judgment of the court of appeals conflicts with two decisions of the Eleventh Circuit. App. 13a.

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[14] At least five other states have intestate succession statutes that, like Indiana's, would prevent a posthumous illegitimate child from inheriting from his father unless the child established paternity within a short time of the father's death. *See, e.g.*, Mass. Ann. Laws ch. 190, § 7(b) and ch. 197, § 9 (requiring paternity action for purposes of intestate succession to be filed within one year of intestate's death); Miss. Code Ann. § 91-1-15(3)(c) (requiring child to file paternity action within one year of intestate's death); N.C. Gen. Stat. § 49-14(c) (requiring paternity actions to be commenced within one year of putative father's death); S.C. Code Ann. § 62-2-109(2)(ii) (requiring paternity to be established by an action filed within the later of 8 months of putative father's death or six months after the probate of his estate); Va. Code Ann. § 64.1-5.1(4) (requiring paternity action be filed within one year of intestate's death).

The starkest conflict is with *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992). In *Daniels*, the Commissioner of Social Security, relying on the Social Security Act's incorporation of a Georgia intestacy statute that required the paternity of an illegitimate child to be established within the father's lifetime, denied survivors' benefits to an illegitimate child who was two and one-half years old when his father died. The Eleventh Circuit held that, whether or not the Georgia statute was constitutional as a state intestacy statute, its application through the Social Security Act violated equal protection as applied to illegitimate children who were only a few years old when their fathers died.

Emphasizing that the case challenged a "particular eligibility requirement of the Social Security Act, not the constitutionality of the Georgia statute," *id.* at 1521, the Eleventh Circuit concluded that the Social Security Act's incorporation of the state statute could not be reconciled with *Mills*, *Pickett*, and *Clark*. Since those cases required a reasonable opportunity to assert a claim on behalf of an illegitimate child, and since they also established that one, two, even six years after the child's birth was not long enough to provide that opportunity, the Eleventh Circuit concluded that the Social Security Act's incorporation of a requirement that, as applied, compelled a child to establish paternity before he was three years old violated equal protection. As the court explained, the Social Security Act, by utilizing the state's intestacy statute, "effectively impose[d] an unconstitutional insurmountable barrier which denie[d] [such children] the equal protection of the laws." *Id.* at 1520 (internal quotation omitted).

The Eleventh Circuit rejected the Commissioner's argument that *Lalli*, and not the *Mills* line of cases, controlled the constitutional analysis, reasoning that "the primary purpose of survivors benefits is to provide support for dependents of a deceased wage earner," not to provide any inheritance-related rights. *Id.* at 1521. Thus, the court concluded, "[u]nlike *Lalli*, this case does not involve a state's interest in the orderly disposition of property at death." *Id.*

The Seventh Circuit's decision also conflicts with the Eleventh Circuit's earlier decision in *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983). In *Handley*, an illegitimate child's father fell into a coma before her birth; the father died, without regaining consciousness, four months after the child's birth. *Id.* at 1001. The Commissioner denied the child's application for survivors' benefits on the ground that she had not established paternity before her father's death, as required under the Alabama intestacy statute as incorporated into the Social Security Act. *Id.* at 1000-01. But the Eleventh Circuit reasoned that the child did not "have a meaningful opportunity" to establish paternity under the *Mills* line of cases, because her mother "had at most four months during which to sue — virtually no time at all with which to cope with the disruption caused by her child's birth and by the [death] of the child's father." *Id.* at 1001-02. Accordingly, the court held that the application of Alabama's intestacy statute, through the Social Security Act, denied equal protection to illegitimate children who are less than one year old when their fathers die.

This case would almost certainly have been decided differently under the approach taken by the Eleventh Circuit in *Daniels* and *Handley*. Instead of analyzing the constitutionality of the state intestacy statute under *Lalli*, the Eleventh Circuit would have analyzed the constitutionality of the Social Security Act's incorporation of that statute under *Mills*, *Pickett*, and *Clark*. Moreover, if equal protection is violated, as the Eleventh Circuit concluded, by a statutory scheme that requires a child to establish paternity within the first years of life in order to obtain survivors' benefits, then equal protection surely is violated by a statutory scheme that requires a child to sue to establish paternity before he or she is even born. The Court should grant certiorari to resolve this conflict between the decision below and these decisions of the Eleventh Circuit.

III. THIS CASE PRESENTS IMPORTANT AND RECURRING ISSUES OF CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of the constitutional issues presented by this case was acknowledged by the government below and reflected in the competing opinions of the sharply divided panel. The Seventh Circuit's granting rehearing *en banc*, and then splitting evenly on whether *Lalli* or *Mills* is the controlling precedent of this Court, further demonstrate the significance and difficulty of these issues and the need for definitive resolution by this Court.[15]

These issues are also recurring ones, as illustrated by the conflicting Eleventh Circuit decisions discussed above. A number of other states, in addition to Indiana, have intestacy statutes that, as incorporated into the Social Security Act, would deny an illegitimate child born after (or even shortly before) his or her father's death any "reasonable opportunity" to establish eligibility for survivors' benefits. *Mills*, 456 U.S. at 99; *see* note 14, *supra* (citing statutes). Indeed, just last Term, the Court summarily considered a Fourth Circuit case in which an illegitimate child challenged the constitutionality of the Social Security Act's incorporation of North Carolina's intestacy statute requiring paternity actions to be filed within one year of the putative father's death. *Lawrence on Behalf of Lawrence v. Chater*, 116 S. Ct. 604, 605 (1996).[16] The question presented to the Court

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[15] The Court has on several occasions reviewed judgments of equally divided *en banc* courts of appeals. *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

[16] In *Lawrence*, the Court granted certiorari, vacated the decision below, and remanded the case to the Fourth Circuit in light of the Commissioner's new interpretation of the Social Security Act. The Solicitor General informed the Court in *Lawrence* that the Commissioner had "re-examined the role of state paternity and intestacy laws in the federal benefits scheme and now interprets the Social Security Act as requir[ing] a determination, at least in some circumstances, of whether

in *Lawrence* was virtually identical to the question presented here.[17]

The Commissioner continues to maintain that *Lalli*, not *Mills* and its progeny, controls the equal protection inquiry in cases presenting similar claims of unconstitutional discrimination against illegitimate children under the Social Security Act.[18] In light of the Commissioner's institutional reliance on *Lalli*, which is bound to affect eligibility determinations nationwide for Social Security survivors' benefits, this Court's guidance is needed, now, as to whether *Lalli* even applies in these circumstances. If, as we submit, *Lalli* does not apply, the Commissioner herself, as well as claimants for survivors' benefits, will benefit from this Court's prompt resolution of the issue.

Finally, not only are the issues presented here important to the lower court judges who must apply this Court's equal protection jurisprudence and to the bureaucrats who must administer the Social Security program; these issues are also vitally important to children like Scotty, who are being denied needed support through no fault of their own, and to their unwed mothers. More children

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the state intestacy statute is constitutional." *Id.* (internal quotations omitted). The Commissioner's new position on determining the constitutionality of the underlying state intestacy statute does not resolve the issue here of determining the constitutionality of the Social Security Act's *incorporation* and *application* of such statutes.

[17] The question presented was "[w]hether the Trial Court's application of North Carolina law with the Social Security Act in denying the Petitioner benefits of a deceased wage earner under the Social Security Act violates the Petitioner's constitutional right to due process and equal protection." Petition for Writ of Certiorari, *Lawrence v. Chater*, at 2, (U.S. 1995) (No. 94-9323).

[18] The Commissioner or, previously, the Secretary of Health and Human Services has consistently urged that *Lalli*, not the *Mills* line of cases, controlled the constitutional analysis in similar cases. *See, e.g.*, App. 2a-26a (this case below); *Daniels*, 979 F.2d at 1521; *Handley*, 697 F.2d at 1003-04.

are born out of wedlock today than at any other time in our nation's history: nearly one-third of all American births (70% of African-American births) now occur outside the bonds of marriage. David Popenoe, *Life Without Father* 34 (1996).[19] And all too many of these children are born to women, like Scotty's mother, who are young, poor, and unfamiliar with the legal system.[20] Moreover, as a result of the recent restructuring of federal "welfare" programs, these children and their mothers have fewer alternatives for assistance than in the past.[21] It thus seems inevitable that the number of cases like Scotty's will only increase in the years ahead.

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[19] By way of comparison, just 5.3% of all American births (22% of African-American births) occurred out of wedlock in 1960. David Popenoe, *Life Without Father*, at 34.

[20] Carl Horowitz, *The Scary Jump in Teen Births*, Investor's Business Daily, Aug. 29, 1996, at A1 (noting high correlation between poverty and teen pregnancy).

[21] Francis X. Clines, *Clinton Signs Bill Cutting Welfare*, The New York Times, Aug. 23, 1996, at A1 (describing new welfare law "end[ing] six decades of guaranteed help to the nation's poorest children").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 16, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Argued November 27, 1995-Decided March 6, 1996
Reargued En Banc June 17, 1996—Decided June 17, 1996

Before
Hon. Richard A. Posner, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge
Hon. Diane P. Wood, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

CHRISTI HAAS, as parent and natural guardian of SCOTT M. GLENN, II, *Plaintiff-Appellant*,	)	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 94 C 238
No. 95-1918 v.	)	Roger B. Cosbey, *Magistrate Judge*.
SHIRLEY S. CHATER, Commissioner of Social Security, *Defendant-Appellee*.	)	

ORDER

The judgment of the district court is AFFIRMED by an equally divided court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Christi HAAS, as parent and natural guardian of Scott M. Glenn, II,

Plaintiff-Appellant,

v.

Shirley S. CHATER, Commissioner of Social Security,

Defendant-Appellee.

No. 95-1918.

Argued Nov. 27, 1995.

Decided March 6, 1996.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division, No. 94 C 238; Roger B. Cosbey, Magistrate Judge.

Ivan A. Lebamoff, Thomas P. Boyer, Ann M. Trzynka (argued), Fort Wayne, IN, for Plaintiff-Appellant.

Robert N. Trgovich, Office of the United States Attorney, Fort Wayne, IN, Michael C. Messer (argued), Department of Health and Human Services, Region V, Office of the General Counsel, Chicago, IL, for Defendant-Appellee.

Before POSNER, Chief Judge, and BAUER and DIANE P. WOOD, Circuit Judges.

POSNER, Chief Judge.

A dependent child of a wage earner is entitled to "child's insurance benefits" under the Social Security Act if the wage earner is insured under the Act and dies, becomes disabled, or reaches the age of 65. 42 U.S.C. § 402(d). Problems of determining entitlement sometimes arise when the wage earner dies and was not married to the child's mother. The Act contains an exhaustive list of methods of establishing entitlement to child insurance benefits in such a case: proof that the wage earner would have been married to the child's mother but for a technical deficiency in the marriage; a written acknowledgment of paternity by the wage earner; a judicial decree that the wage earner was the child's father, provided the decree was issued before the wage earner died; a court order that the wage earner contribute to the support of the child because the wage earner was the child's parent; a determination by the Social Security Administration that the wage earner was the parent of the child and was living with or contributing to the support of the child when the wage earner died; or proof that the child was entitled to inherit from the wage earner under the law of intestate succession of the wage earner's state of domicile. 42 U.S.C. §§ 416(h)(1)(B), (2), (3). Only the last-mentioned of these methods (§ 416(h)(2)(A)) was available to Scott M. Glenn, II, the applicant in our case, born November 6, 1992, eight months after the death in an automobile accident of Scott M. Glenn, the wage earner. The child's mother, Christi Haas, had not been married to the wage earner or living with him; no paternity decree or support order had been issued; and he had provided no support directly or indirectly to the unborn child.

One month after Scott's birth, his mother filed a petition in an Indiana state court to establish the wage earner's paternity. The wage earner's mother, who was the personal representative of his estate, testified in support of paternity, and the court entered a declaration that the wage earner was indeed the child's father. The estate later filed a suit for wrongful death based on the accident in which the wage earner had been killed. The court in which that suit was filed determined that the child, as the only dependent next of kin of a decedent who had left no widow, was

entitled to the proceeds of the suit (which was eventually settled). Ind. Code § 34-1-1-2.

The administrative law judge acknowledged that there was satisfactory evidence of the wage earner's paternity but nevertheless denied the application for benefits. Young Glenn's eligibility for benefits depended on his eligibility to inherit under Indiana's intestate succession law, and Ind. Code § 29-1-2-7(b) provides that, "for inheritance," a child born out of wedlock will be treated as if his parents were married only if

> (1) The paternity of the child has been established by law in a cause of action that is filed:
>
> (A) During the father's lifetime; or
>
> (B) *Within five (5) months after the father's death;* or
>
> (2) The putative father marries the mother of the child and acknowledges the child to be his own. [Emphasis added]

The suit to establish the wage earner's paternity "for inheritance" had been brought one month after the child's birth and therefore nine months after the wage earner's death: too late.

The appellant argues that the five-month statutory deadline is merely a statute of limitations and hence is waived by not being pleaded. It was not pleaded in the paternity suit. In fact that suit was uncontested. The most common type of paternity suit is one brought against a man who denies paternity, or at least doesn't want the financial burdens of fatherhood. Here the man was dead, and apparently left no assets other than a claim for wrongful death. Since the personal representative of his estate believed herself to be the child's grandmother, and since unless she herself had been dependent on the decedent, of which there is no hint in the record, she would have had no personal stake in the wrongful-death action, she had no financial incentive to resist the paternity suit and she did not resist it. She had nothing to lose and money for the child whom she believed to be her grandson to gain.

Although the facts are unusual and doubts about the wage earner's paternity slight, the danger of collusive paternity suits is not slight. Whenever the putative father dies, a child or children can sue to establish paternity, knowing that the father's estate, if it has no assets or at least no assets other than what a child might claim, may not bother to contest the suit. In such a case a spurious allegation of paternity might provide the basis for awards of child insurance benefits, for certain life insurance or employee death benefits, for the inheritance of an intestate estate that might otherwise escheat to the state because the decedent had no known relatives, or for the proceeds of a legal judgment. The first and last incentives for a collusive paternity suit were present here and the suit was not contested, although, as we said, the probability seems slight that the allegation of paternity was spurious. We do not know, of course. We have pointed out that the grandmother had no stake in the wrongful-death suit and therefore no reason to resist the claim of paternity; nor did anyone else. But we do not rest our decision on any doubts that Glenn senior is the claimant's father.

Whether Indiana's five-month statute of limitations was motivated by a concern with preventing collusive paternity suits, or whether, as suggested in *S.V. v. Estate of Bellamy*, 579 N.E.2d 144, 148 (Ind. App. 1991), the only concern was with the prompt winding up of estates (for remember that the five-month limitation is applicable only when the purpose of the paternity suit is to establish a right of inheritance), the policy behind the deadline would be impaired were the deadline deemed waived simply by not being pleaded. This makes it unlikely that the Indiana legislature intended the deadline to be an ordinary statute of limitations, which like other affirmative defenses is waived if the defendant fails to plead it. Its location in the statute is another clue that it is an element of the plaintiff's claim rather than an affirmative defense. *Bocek v. Inter-Insurance Exchange*, 175 Ind. App. 69, 369 N.E.2d 1093, 1097 (1977); *General Motors Corp. v. Arnett*, 418 N.E.2d 546, 548 (Ind. App. 1981). The distinction between the two types of limitation is a familiar one in the law, *Boggs v. Adams*, 45 F.3d 1056, 1060 and n.8 (7th Cir.

1995), though it has been criticized as archaic. *Tregenza v. Great American Communications Co.*, 12 F.3d 717, 719 (7th Cir. 1993).

It is true that Indiana courts have sometimes construed deadlines for bringing paternity suits as mere statutes of limitations. *In re Paternity of T.C.S.*, 576 N.E.2d 633 (Ind. App. 1991); *D.E.F. v. E.M.*, 173 Ind. App. 274, 363 N.E.2d 1030, 1032 (1977). But these were not cases in which the objective of the suit was to establish entitlement to inherit. Such a suit is governed by the five-month limitation, which if waivable would expose the settlement of decedents' estates to debilitating uncertainty. A new heir might appear, claiming a share of the estate, after the assets of the estate had been distributed to the known heirs, and the defendant in the paternity suit might fail, deliberately or inadvertently, to plead the statute of limitations. That is not an issue here, but we are considering whether the deadline would be waivable in suits brought under the Indiana statute, that is, suits to establish paternity for the purpose of inheritance. *Bocek* holds that time limits on the bringing of suits based on statutory rights are elements of the claim, and neither *T.C.S.* nor *D.E.F.* alludes to this principle; maybe it was not argued in those cases. *Bocek* does not stand alone. Two other Indiana cases hold that the identical five-month deadline for bringing suit against a decedent's estate is an element of the claim and not merely a statute of limitations. *McEwen v. McEwen*, 529 N.E.2d 355, 358-59 (Ind. App. 1988); *Rising Sun State Bank v. Fessler*, 400 N.E.2d 1164, 1166 (Ind. App. 1980). The statutory language at issue in those cases was more emphatic than the statutory language at issue here — it was that suits not brought within five months "shall be forever barred." Ind. Code § 29-1-14-1(a). But given the identity of the deadlines and the fact that both statutes are concerned with inheritance (and so presumably reflect the same desire for a swift resolution of decedents' estates), we would be surprised to find the deadline treated as an element of the claim in one and as a mere statute of limitations in the other. An argument could be made that the deadline should be tolled until the child was born, but Haas does

not make the argument, perhaps because it was considered and rejected in *S.V. v. Estate of Bellamy*, *supra*, 579 N.E.2d at 145.

We add for completeness that even if the five-month deadline is waivable, the Social Security Administration might not be bound by a determination of paternity made in an uncontested proceeding. *George v. Sullivan*, 909 F.2d 857 (6th Cir. 1990); *Gray v. Richardson*, 474 F.2d 1370, 1373 (6th Cir. 1973). But the Social Security Administration did not base its denial of benefits on the lack of contest, so neither may we. We are convinced that the five-month deadline is nonwaivable.

This short, unwaivable deadline is a crude device for discouraging fraudulent or collusive paternity claims designed to establish a right of inheritance; but it is not completely arbitrary. When the unmarried father of a child dies, and there has been no determination of paternity, almost the mother's first concern will be the establishment of paternity and she can be expected therefore to move immediately. If she does not, this may be an indication that she does not believe, or at least lacks confidence, that the "father" really is her child's father. Granted, it is a weak indication. It might not occur even to a person relatively knowledgeable about law that a paternity suit could be, let alone that it must be, brought *before* the birth of the child whose paternity was to be determined. Given this point and the high probability that the wage earner in this case really is the child's father, the application of the statute produces a harsh result and thus sets the stage for the appellant's challenge to the statute's constitutionality, or more precisely to the constitutionality of the statute's incorporation into the Social Security Act.

The two issues are not identical, and the first is a nonstarter. A child seeking to inherit property from his natural father under Indiana intestacy law *might* challenge the five-month deadline, arguing that it makes the statute discriminate impermissibly against children born out of wedlock, in violation of the equal protection clause. But it is pretty certain that the argument, and the suit based upon it, would fail. The interest in protecting decedents' estates against phony claims and in winding up these

estates promptly and definitively has been held to justify even tighter limitations. *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978), held constitutional a state statute that required a court order of filiation before the putative father's death. *S.V. v. Estate of Bellamy*, *supra*, 579 N.E.2d at 148-49, upheld Indiana's five-month limitation against the challenge just sketched, in reliance on *Lalli*. *See also Trammell on behalf of Trammell v. Bowen,* 819 F.2d 167, 170 (7th Cir. 1987).

Applied to this case, the statute upheld in *Lalli* would have required the impossible: a court order of filiation within one month of conception. We cannot be certain that *Lalli,* which involved an adult child seeking to inherit, would have come out the same way had the facts been as in the present case. Several courts have held since *Lalli* that if state law makes it impossible in the circumstances to establish paternity, the law is unconstitutional if applied in those circumstances. *Handley by and through Herron v. Schweiker,* 697 F.2d 999, 1004 (11th Cir. 1983); *Cox v. Schweiker*, 684 F.2d 310, 323 (5th Cir. 1982). The Fourth Circuit disagrees. *Jones v. Schweiker*, 668 F.2d 755 (4th Cir. 1981), vacated because of a change in state law as *Jones v. Heckler*, 460 U.S. 1077, 103 S.Ct. 1763, 76 L.Ed.2d 339 (1983); *Parsons for Bryant v. Health & Human Services,* 762 F.2d 1188, 1190 (4th Cir. 1985). So does an Eleventh Circuit decision subsequent to *Handley,* though it involves a different section of the Social Security Act: *Orsini on behalf of Orsini v. Sullivan,* 903 F.2d 1393 (11th Cir. 1990). In any event, there is no impossibility here; Christi Haas knew that she was pregnant, and she had five months to sue. She must also have known that since she neither had been married to the father nor lived with him, his paternity might be questioned. All she had to do was *file* the paternity suit within five months of Scott Glenn's death; the statute does not require that the determination of paternity be made within that (or any other) period. The filing would not be burdensome, and it would provide notice to the estate.

Young Glenn is not seeking a share of his putative father's estate. He is seeking child insurance benefits that are no part of the estate. So the policy of protecting estates is not in play.

Another policy is, however. The purpose of federal child insurance benefits, a purpose shared by some but of course not all bequests, is to replace the support that the child would have received from his father had the father not died. *Trammell by Trammell v. Bowen*, *supra*, 819 F.2d at 169. Consistent with this purpose, the sections of the Social Security Act that define the entitlements of children born out of wedlock, 42 U.S.C. §§ 416(h)(2) and (3), have been crafted not to determine paternity alone but paternity plus likelihood of support. Every father whose parental rights have not been terminated (as by the lawful adoption of the child by another person) has a legal duty to support his child, Ind. Code § 35-46-1-5; 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 5.4, p. 317 (2d ed. 1987), but the reality is of course different and many fathers, especially of children born out of wedlock, do not support their children. The fact that Scott M. Glenn, II, is probably the child of the wage earner is not by itself proof or even strong evidence that if Glenn senior had lived he would have supported the child. The Social Security Act establishes criteria designed to identify the likely supporters. The criteria constitute a coarse filter, but not so coarse a one that we are moved to declare the relevant provisions unconstitutional, especially since the appellant's lawyer has no suggestions for an alternative method of screening out the applications of children whose fathers would not have been likely, had they lived, to support them. It is true that Scott's "dependency" was determined in the wrongful-death action, but that determination has no standing under the Social Security Act, and for all we know may have been based simply on the judgment in the paternity suit.

Although the equal protection clause of the Constitution has been interpreted to forbid unreasonable discrimination against children born out of wedlock, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); see *Bennemon on behalf of Williams v. Sullivan*, 914 F.2d 987, 988-89 (7th Cir. 1990), some difference in treatment is inevitable. The institution of marriage is not purely arbitrary or conventional. One of its advantages — historically one of its

most important functions — is to establish a clear framework for the support of children. When the framework is missing, the child is at a disadvantage in establishing a range of entitlements, and one of them is to child insurance benefits under the Social Security Act. With Glenn senior dead, the question what if any support he would have provided to the child of a woman to whom he was not married and with whom he had not been living became inherently uncertain. The fact that he died eight months before the child was born aggravated the uncertainty.

It is true that one of the grounds in the Social Security Act for the award of child insurance benefits is a determination by the Social Security Administration that the wage earner was contributing to the support of the applicant when he died. Financial contributions made by the wage earner to the mother during pregnancy have been construed as support for the as yet unborn child. E.g., *Adams v. Weinberger*, 521 F.2d 656, 660 (2d Cir. 1975); *Parsons for Bryant v. Health & Human Services, supra*, 762 F.2d at 1191; *Doran v. Schweiker*, 681 F.2d 605, 609 (9th Cir. 1982). How regular and substantial the contributions must be to satisfy the statute remains unsettled, *Bennemon on behalf of Williams v. Sullivan, supra*, 914 F.2d at 990, but the issue is academic here because Glenn senior contributed nothing to the support of the child's mother. We have been given no reason to suppose that he intended to marry or live with her, to contribute to her support or that of the child, or even to acknowledge paternity.

Congress has decided that, all other routes to demonstrating the likelihood of support being closed, if the child's state was willing to allow the child to take by intestacy from the putative father this is enough evidence that the putative father would have supported the child to entitle the child to benefits in lieu of that support taken away by death. Congress may not have been required to go that far. *Mathews v. Lucas*, 427 U.S. 495, 514-15, 96 S.Ct. 2755, 2766-67, 49 L.Ed.2d 651 (1976), holds that Congress was not required to go further. *Mathews* upheld section 416(h)(2), the section on which the Social Security Administration relies in this case, against a challenge that it is too crude a predictor that the

deceased father, had he lived, would have supported the child. See also *Imani on behalf of Hayes v. Heckler*, 797 F.2d 508, 513 (7th Cir. 1986); *Trammell v. Bowen*, *supra*. We are mindful that *Daniels on behalf of Daniels v. Sullivan*, 979 F.2d 1516, 1521 (11th Cir. 1992), holds that the equal protection clause forbids Congress to use a short state-law deadline for establishing paternity for inheritance to block a claim for child insurance benefits, since support and inheritance involve a different balance of interests. The court in *Daniels* did not explain how its result could be reconciled with *Mathews v. Lucas*, and its conclusion is in conflict not only with the Fourth Circuit's decisions in *Jones* and *Parsons* but also with the Eleventh Circuit's own decision in *Orsini*, as well as with the spirit of our decision in *Imani*.

Even if section 416(h)(2) is invulnerable to constitutional challenge, we are sure, as the Social Security Administration conceded in *Lawrence on behalf of Lawrence v. Chater*, ____ U.S. ____, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (per curiam), that Congress did not intend the incorporation of *unconstitutional* state intestacy statutes. If the five-month deadline in the Indiana statute could not constitutionally be applied in a suit by a child to inherit property, then it could not be used as the basis for denying claims under the Social Security Act. *Cox v. Schweiker*, *supra*, 684 F.2d at 317-18. But this route, it seems, is blocked by *Lalli*. The Indiana statute *is* constitutional.

With *Lalli* having upheld a limitations period for determining heirship that is even shorter than Indiana's, and *Mathews v. Lucas* having upheld the incorporation of such limitations into the federal statute, the application for benefits in the present cases is doomed unless the Supreme Court is minded to reexamine either decision or unless the present case can somehow be distinguished from *Lalli*. *Mills v. Habluetzel*, 456 U.S. 91, 100, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982), decided after *Lalli*, held that 12 months after the child's birth was an unconstitutionally short deadline for a child born out of wedlock to bring a suit for support against his putative father, and here suit was brought only one month after the child's birth. See also *Pickett v. Brown*, 462 U.S. 1, 18, 103 S.Ct. 2199, 2209, 76 L.Ed.2d 372 (1983); *Clark*

v. Jeter, 486 U.S. 456, 464, 108 S.Ct. 1910, 1915-16, 100 L.Ed.2d 465 (1988). Yet none of the opinions in these cases questions the continued validity of *Lalli*. See, e.g., *Mills v. Habluetzel, supra,* 456 U.S. at 99, 102 S.Ct. at 1554-55. The cases did not involve claims against an estate, so the policy of winding up estates swiftly was not in the pan on the state's side of the balance. Of course the present case does not involve a claim against an estate either. But Congress's policy, expressly upheld in *Mathews v. Lucas*, is, as we have seen, to tie entitlement to child insurance benefits to entitlement to intestacy benefits, or in other words to make the child's claim against the Social Security Administration depend upon the outcome of a *hypothetical* claim against the estate. If the latter would fail, the former fails. The element of arbitrariness has been deemed tolerable.

Lalli is different from this case because, as we pointed out earlier, the claimant there was an adult and had had many years to establish paternity. Similarly, the claimant in *Trammell* had a number of alternative routes to establishing entitlement to the benefits he sought. Our claimant was in a bind, having not yet been born when his putative father died. Nevertheless, as there is no question of its having been *impossible* for the mother to have instituted a paternity suit within five months of the wage earner's death, we cannot find any adequately clear, minimally predictable basis for carving out an exception to *Lalli*. We *could* hold, as urged by the plaintiff, that a five-month deadline for the bringing of paternity suits on behalf of posthumously born children is unconstitutionally short, even when the object of the suit is to establish a right of inheritance. But then what would be the minimum deadline? Five months after birth? This would give the mother 14 months to sue if the decedent had died immediately after conception, significantly delaying the winding up of estates. The harm from such delay would have to be balanced against the harm to the children. *Lalli* implies that the balance is for the state to strike within limits not here exceeded.

The combined effect of *Lalli* and *Mathews* is to place claimants in the position of young Scott in a box. *Lalli* makes clear that the

Indiana statute is constitutional as applied to inheritance, *Mathews* that the Social Security Act is constitutional in incorporating the (constitutional) Indiana statute. Only the Supreme Court possesses the key that will open the box. We cannot be certain that it will turn the key. Courts are inclined to leave arbitrary line-drawing to legislatures. The creation of the exception sought by the plaintiff would entail a degree of statutory fine-tuning that may or may not exceed the Supreme Court's current conception of what the judiciary may properly and feasibly accomplish in the name of the Constitution. That is for the Court, not us, to say.

AFFIRMED.

DIANE P. WOOD, Circuit Judge, dissenting.

On the strength of the Supreme Court's decision in *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978), in which the Court upheld a New York statute that precluded an adult illegitimate from proving paternity in a probate proceeding, the majority decides today that a child who was a one-month fetus at the time his father died is barred from showing that he was entitled to inherit from his father because the State of Indiana requires such claims to be brought within five months of the father's death. Ind. Code § 29-1- 2-7(b)(1)(B). Because I believe that this result extends *Lalli* far beyond its legitimate reach, and that this ruling conflicts both with the Supreme Court's decisions in *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982), *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983), and *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988), and with the decisions of the Court of Appeals for the Eleventh Circuit in *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992), and *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983), I respectfully dissent.

I.

This case, like the one recently before the Supreme Court in *Lawrence v. Chater*, ___ U.S. ____, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996), raises the question whether the Commissioner of Social Security must determine the constitutionality of a state

statute before relying upon that law in a benefits determination relying upon 42 U.S.C. § 416(h)(2)(A), and further, if that state statute is unconstitutional, whether benefits are due. As the majority notes, Scott Glenn II's eligibility for benefits under 42 U.S.C. § 402(d) turns on his ability to show that he is a "dependent child of a wage earner." Of the several ways offered in § 416(h) to prove this relationship, the only one available to young Scottie, is proof that he was eligible to inherit under Indiana's intestate succession law, Ind. Code § 29-1-2-7(b). This is so largely because his father, Scott M. Glenn ("Scott Sr."), was tragically killed in an automobile accident only one month after Scottie's conception; thus, the parents did not have time to regularize their relationship by marriage, to obtain a court decree of paternity, to execute a written acknowledgment of paternity, or to take advantage of any of the other avenues provided in the federal statute.

The Indiana intestacy statute allows a child born out of wedlock to inherit only if

> (1) The paternity of the child has been established by law in a cause of action that is filed:
>
> (A) During the father's lifetime; or
>
> (B) Within five (5) months after the father's death; or
>
> (2) The putative father marries the mother of the child and acknowledges the child as his own.

Ind. Code § 29-1-2-7(b). In this case, the fact that Scott Sr. was Scottie's father was established by the decree of the Allen Superior Court in Indiana, Cause No. 02D07-9212-JP-753, February 9, 1993. In addition, the Allen Superior Court issued an order establishing that Scott Glenn II is the "dependent child" of Scott M. Glenn for purposes of asserting a claim under Indiana's Wrongful Death Statute, Ind. Code § 34-1-1-2, Cause No. 02D01-9402-CT-17, September 9, 1994. Nevertheless, in spite of the fact that every time the Indiana court responsible for the case has confirmed the fact that Scott Sr. was Scottie's father, the Commissioner here has interpreted the Indiana intestacy

statute as an absolute bar to his ability to inherit from his father, and therefore to his ability to qualify as a dependent child of the wage earner for purposes of the Social Security Act.

Scottie's mother, Christie Haas, filed the paternity action on Scottie's behalf approximately one month after his birth. However, that was indisputably neither within the father's lifetime nor within five months of his death. The Social Security Administration therefore concluded that Scottie could not qualify under Indiana's intestate succession law, and thus that he did not qualify for benefits. On Scottie's behalf, Haas argues here that the Commissioner's negative determination was wrong on two grounds. First, she contends that the five month limitation in the Indiana statute is merely a statute of limitations, and hence is waivable (and was waived here by the estate). On that theory, Scottie is entitled to inherit under the Indiana intestacy scheme, and he thus is qualified for the Social Security benefits in question. Second, she argues that if the Commissioner correctly read the Indiana law, that law unconstitutionally discriminates against a distinct class of illegitimate children. She further asserts that in the absence of this unconstitutional discrimination, Scottie has proven both his ability to inherit under the intestacy statute and his dependence for purposes of the Social Security Act.

Haas' first argument is appealing for its simplicity, but I agree here with the majority that Indiana law indicates the five-month period is an element of the claim, not an ordinary, waivable, statute of limitations. The administration of estates is an enterprise that typically involves multiple parties, some easily ascertainable and others less so. Thus, unlike the ordinary bilateral lawsuit with specific parties (or their legal representatives, as in class actions) on both sides, it would be harder to know in a probate case from whom waivers would need to be secured for limitation periods like the one in Indiana's statute. The state therefore reasonably can take the position that potential heirs take the necessary steps to establish their relationship to the deceased within a reasonable period of time, so that they are then in a position to join the probate proceeding. Whether, in the ordinary case, it is sufficiently generous to allow

illegitimates to obtain a judicial decree of paternity during their father's lifetime or within five months of his death is not the question before us. Instead, the question is whether Indiana expects five-month fetuses or their representatives to bring paternity actions, whether Indiana would construe the five-month limitation period to begin running from the date of a live birth, or if Indiana would take some other approach for posthumously born illegitimate children.

In my opinion, it is not at all clear that Indiana would not toll its five-month substantive limitation period during the time a child is in utero, and to have it run thereafter. This is the approach that courts take in similar situations, such as a tort action for injuries suffered prior to birth or a wrongful death action where the parent dies before birth. *See generally* Prosser & Keeton, The Law of Torts § 55, at 368 (5th ed.1984). The fetus does not have a tort cause of action of any kind unless and until that fetus becomes a child, at the moment of live birth. *See Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991). If the Supreme Court of Indiana disagreed with the appellate ruling in *S.V. v. Estate of Bellamy*, 579 N.E.2d 144 (Ind. App. 1991), and construed its law to require tolling, then Scottie wins easily. His mother filed suit within a month of his birth, well within any five-month limitation period that might have applied. For what it is worth, every indication we have from the Indiana courts involved in Scottie's case supports this approach.

Nevertheless, on the assumption that the majority accurately predicts Indiana's interpretation of its intestate succession statute, it is necessary to reach the constitutional issue. Before turning to the particulars of this case, it is helpful to review the considerable jurisprudence the Supreme Court has developed that relates to classifications based upon legitimacy. In brief, this review demonstrates that the Court applies an intermediate level of scrutiny to this kind of classification, that it will strike down state laws that erect insurmountable barriers to the child's assertion of rights, and that the Court has regularly invalidated state laws that impose unreasonably short periods of time for asserting the rights in question.

In *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976), the Court upheld the provisions of the Social Security Act that generally condition eligibility for surviving child's benefits for illegitimate children upon a showing that the deceased wage earner was the claimant's parent and, at the time of death, was living with the child or contributing to his or her support. The application of the provisions of the Social Security Act permitting proof of eligibility by reference to state intestacy laws was not before the Court in *Lucas*. *See id.* at 501. Instead, the Court rejected the blanket claim that a denial of benefits to illegitimate children whose paternity was "clear" violated the Fifth Amendment of the Constitution when legitimate children would certainly have received the benefits. The state courts in *Lucas* had never issued a declaration of paternity, and the challenge was brought by children who were approximately eight and fifteen years old at the time of their father's death. The Court repeatedly noted, in reaching this result, that it was not applying "strict scrutiny" to the classification at issue, but it did not indicate with precision what lesser level of scrutiny was actually being used.

The next key case, on which the majority relies extensively, was *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978). In *Lalli,* the Court considered the constitutionality of a New York statute that required illegitimate children seeking to inherit from their father by intestate succession to demonstrate that a court of competent jurisdiction had made an order of filiation during the lifetime of the father, in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child. Five members of the Court voted to uphold the law. Justice Powell wrote a plurality opinion for himself, Chief Justice Burger, and Justice Stewart; Justice Blackmun wrote a separate statement concurring in the judgment; and Justice Rehnquist wrote his own brief statement concurring in the judgment. The other four members of the Court dissented.

The facts of *Lalli* were significantly different from those presented to us here, and even the majority concedes that it cannot be certain that *Lalli* "would have come out the same way

had the facts been as in the present case." *Ante* at 563. The appellant *Lalli,* who was an adult at the time his putative father died, conceded that he had not obtained the required order of filiation. He claimed, however, that his inability to prove his relationship with the deceased through other means violated the Equal Protection Clause. The judgment of the Court rejected this argument and upheld the New York statute.

In reaching this conclusion, Justice Powell's plurality opinion analyzed the question whether the procedural requirements of the New York law bore "an evident and substantial relation to the particular state interests this statute is designed to serve." *Id.* at 268, 99 S.Ct. at 524. Emphasizing the State's interest in the just and orderly disposition of property at death, the "peculiar problems of proof" for paternal inheritance, and the need to avoid spurious claims, the plurality was persuaded that the New York statute drew constitutionally acceptable lines. It distinguished *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), which had struck down an Illinois inheritance law that discriminated against illegitimates, as a case where the state law "effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents." 439 U.S. at 273, 99 S.Ct. at 527.

In every case dealing with illegitimacy since *Lalli,* the Supreme Court has struck down state statutes that impose unrealistic burdens on children attempting to establish paternity for support purposes. In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982), the Court faced an Equal Protection challenge to a Texas statute that required an illegitimate child to bring a paternity action before his or her first birthday. Like the Indiana statute here, the Texas limitation period was considered as part of the substantive right, not simply as a procedural limitation on that right. Justice Rehnquist, writing for the Court, began by observing that a State that grants an opportunity for legitimate children to obtain support must also grant that opportunity to illegitimate children, and that opportunity must be more than illusory. He continued:

> The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock.

Id. at 97, 102 S.Ct. at 1553. Although the states may impose greater restrictions on illegitimate children than on legitimate children, because of the risk of stale or fraudulent claims, those restrictions themselves must pass equal protection scrutiny.

Mills established two related requirements for the necessary equal protection analysis. First, the period for obtaining support granted to illegitimate children must be sufficiently long in duration to present a "reasonable opportunity for those with an interest in such children to assert claims on their behalf." *Id.* at 99, 102 S.Ct. at 1555. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. *Id.* at 99-100, 102 S.Ct. at 1554-56. The Court noted in passing that *Lalli* and *Trimble* involved the right of illegitimate children to inherit, while *Lucas* involved the right of illegitimate children to receive social security benefits. But, it said, "[t]here is no reason to think that the factual differences between those cases and the present case call for a variation of the general principle which those cases have laid down." *Id.*, 456 U.S. at 99 n.5, 102 S.Ct. at 1555 n.5. Applying those two requirements to the case before it, the Court concluded that the Texas requirement was an unrealistically short period of time, which "so restrict[ed] those rights as effectively to extinguish them," *id.* at 101, 102 S.Ct. at 1555, and it struck down the Texas statute.

Pickett v. Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983), came to the same conclusion about a Tennessee statute that required a child to file a petition for a determination of paternity and support within two years of his or her birth. The Court saw no meaningful distinction between the one-year rule invalidated in *Mills* and the two-year rule before it. The hardships on the child's representatives were likely to be the

same, and the time limitation was not substantially related to the State's interest in avoiding stale or fraudulent claims. Repeating language from *Mills*, the Court said "[w]e can conceive of no evidence essential to paternity suits that will be lost in only [two years], nor is it evident that the passage of [24] months will appreciably increase the likelihood of fraudulent claims." *Id.*, 462 U.S. at 13-14, 103 S.Ct. at 2207 (internal quotations omitted). The Court also noted that scientific advances in blood testing have alleviated the problems of proof in paternity actions, which further undermined the relationship between the period of limitations and the State's interests.

Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988), is yet another case to the same effect. In *Clark*, the Court invalidated a Pennsylvania statute that required an illegitimate child to bring a suit to establish paternity within six years of her birth. In so doing, the Court stated openly what had been implicit in its prior decisions: these kinds of statutes must pass intermediate scrutiny, which means that the statutory classification must be substantially related to an important governmental objective. *Id.* at 461, 108 S.Ct. at 1914.

The Eleventh Circuit has had two occasions to decide cases almost identical to the one before us now. In *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983), the Secretary of Health and Human Services denied an application for child's insurance benefits under 42 U.S.C. § 402(d)(1) on the ground that the child had not shown she was entitled to inherit under the Alabama intestacy statute. That statute required a judicial determination of paternity within the father's lifetime. The father in question, however, had been fatally injured in an automobile accident and had fallen into a coma some four months before her birth. He remained in the coma until four months after her birth, when he died.

Guided by *Mills*, the court of appeals found that the Alabama scheme presented an insurmountable barrier for a subclass of illegitimate children. It noted that the problems for the child and her family recognized in *Mills* were, if anything, even worse

when accompanied by the emotional and economic turmoil caused by the father's death. It distinguished *Lalli* on grounds equally pertinent here: *Lalli* was a private dispute over estate distribution brought by an adult son who had had plenty of time to obtain an order of filiation, and the statutory scheme was "a minor procedural nuisance" rather than a "total statutory disinheritance" (citing language in *Lalli* that distinguished *Lalli* from *Trimble*). 697 F.2d at 1004. In *Handley,* as a practical matter there was no time when both parent and child were simultaneously alive; "[t]he erstwhile procedural hurdle became an unconstitutional complete and impenetrable barrier." *Id. See also Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992) (invalidating for Social Security Act purposes a Georgia statute that required an illegitimate child to establish paternity during the lifetime of the father, when child was two years, five months old at the time of father's death).

Although the Fourth Circuit arguably came to a different result in *Parsons v. Health* and Human Services, 762 F.2d 1188 (4th Cir. 1985), it is more accurate to say that the Fourth Circuit had a different approach to this kind of case. Following its earlier conclusion in *Jones v. Schweiker*, 668 F.2d 755 (4th Cir. 1981), vacated sub nom. *Jones v. Heckler*, 460 U.S. 1077, 103 S.Ct. 1763, 76 L.Ed.2d 339 (1983), the Fourth Circuit concluded in *Parsons* that even if a state intestacy statute is unconstitutional, the illegitimate child is not entitled to Social Security benefits under § 416(h)(2)(A). In fact, this was once the position of the Social Security Administration, but that has changed. In his response to the petition for certiorari in *Lawrence v. Chater*, *supra*, the Solicitor General announced that the Social Security Administration now interprets the Social Security Act as requiring "a determination, at least in some circumstances, of whether the state intestacy statute is constitutional." ____ U.S. at ____, 116 S.Ct. at 605. The Court granted the Lawrence petition, vacated the decision of the Fourth Circuit denying benefits, and remanded for reconsideration in light of the Administration's change of position.

Even if the Social Security Administration had not changed its view, I would have taken the position that the Commissioner is

not entitled to make an unconstitutional state statute part of the Social Security system, and thus to adopt an unconstitutional distinction between legitimate and illegitimate children. Constitutional limitations would be meaningless if the Commissioner could effectively incorporate into federal law state statutes that discriminated on the basis of race, that imposed prior restraints on speech, or that denied free exercise of religion. I can only assume that the agency also came to this realization, when it took a closer look at the implications of its former view.

Thus, the first step in our analysis here is to decide whether the Indiana statute, as applied to the class of illegitimate children to which Scottie belongs (posthumously born more than five months after the father's death), violates the Equal Protection clause. If so, it would also violate the Constitution for the Commissioner to use that statute to deny Scottie's benefits. Since the Indiana courts have already issued an order of paternity, nothing would remain here but to reverse the denial of benefits and remand to the agency for a determination of how much is due.

Mills, Pickett, and *Clark,* not *Lalli,* provide the analytical approach for our constitutional analysis. The first question is whether the period for obtaining the paternity decree for purposes of the intestacy statute is sufficiently long in duration to present a reasonable opportunity to assert the claim; the second question is whether the time limitations in question are substantially related to an important governmental objective.

For the subclass of illegitimate children who are *in utero* at the time of their father's death, and who are not yet born within five months of his death, it is beyond imagination how anyone can claim that the period of time is sufficiently long in duration to present a reasonable opportunity to assert the claim. They are even worse off than the child in *Handley:* there is not a moment when these children are alive either during their father's lifetime or in the five-month extension provided by the statute. If one year after birth was not enough for the paternity action in *Mills,* if two years after birth were not enough for the paternity action

in *Pickett,* if six years after birth were not enough for the paternity action in *Clark,* it is hard to see how this time period could possibly qualify. This statute gives children in Scottie's position no time at all after their birth to bring the paternity action that is the predicate for intestate succession. For this class, the statutory scheme is not one that is fair *ex ante,* but which results in the occasional unjust outcome from an *ex post* perspective. By its very nature, as the Indiana appellate court observed in *Bellamy,* it always excludes the class of posthumously born illegitimate children at issue here.

The Indiana statute fares no better when we turn to the second part of the test: substantial relationship to important state interests. Intestacy proceedings share many of the concerns that the Supreme Court identified for support actions. The state will want to avoid stale or fraudulent claims, and it will want to assure that the probate proceeding is concluded within a reasonable period of time. I disagree with the majority's conclusion that the five-month rule bears the necessary relationship to those interests here.

First, with respect to stale or fraudulent claims, I consider *Mills, Pickett,* and *Clark* to be practically dispositive. Indeed, requiring pregnant women in Christi Haas' position to rush off to the courthouse and file a paternity action the moment they learn of the death of the father of their child could wind up wasting time for the probate court. Suppose the court acted with dispatch, and rendered an order of paternity by the time the pregnancy was four months along. Suppose further that the woman miscarried at month eight. Would the fetus be entitled to an estate? Would the estate inherit from the father? As the heir of the child, would the mother thus be entitled to take from the father? The answers to these questions are all no, under the laws of every state of the United States. The court would be required to dismiss all potential claims on behalf of the child, having wasted its time on contingencies that were never fulfilled.

Accuracy of paternity determinations is also impeded, not helped, by requiring filings during pregnancy. Unless the State

of Indiana is willing to risk the health of fetuses by subjecting them to dangerous *in utero* invasive procedures, blood tests are out of the question until the child is born. Thus, the only way to prove paternity at such an early stage would be through less reliable anecdotal evidence. True, the State could require the mothers to file "place holder" lawsuits that would become activated only after the birth of a child. But the difference between this and Haas' actual course of conduct is vanishingly small. She filed within a month of giving birth, at a time when every mother is still feeling physically worn out from the birth process and from the midnight feedings. I cannot find that the State had an "important interest" in having some paper sit in the probate court for six months before the paternity action could really proceed.

Next, I consider the State's interest in speedy disposition of estates, on which the majority relies heavily. For the subclass to which Scottie belongs, that doesn't work either. Unless the need to wait for a child *en ventre sa mere* to be born has the effect of holding up any significant number of probate proceedings, this too fails intermediate scrutiny. Although it is somewhat difficult to find reliable statistics from probate courts, the typical time for resolving a simple estate appears to be anywhere from a year and a half to two years. Turner, *Revocable Trusts,* § 1.07 (3d ed. 1995). Obviously, an unborn child will not enter the picture any later than nine months after the father's death. Assume for the sake of argument that (1) the five month period began to run as soon as there was a live birth, (2) the child was conceived on the same day as the father's death, and (3) the estate was opened at the very moment of the father's death. Even on those extreme facts, the need to wait for the birth of the child would still take us only to month fourteen, well below this typical time span. Plainly, the normal case would involve significantly shorter periods of "delay," during which the probate court would probably be conducting its other business in the case.

Finally, I believe that the majority erroneously second-guesses Indiana's decision to declare that Scott Sr. was Scottie's father. It argues that this was not a true adversarial proceeding, like some

(though surely not all) paternity cases, because it was uncontested and the family had nothing to lose. Without any basis in the record, it implies that the Indiana decree might have been tainted by fraud. It states, as if it were an established fact, that the grandmother had "no stake" in the paternity suit. I disagree. The death of a father like Scott Sr. does not mean that his family loses all incentive to oppose a fraudulent paternity action. A positive declaration of paternity will have far-reaching implications for the family beyond these Social Security benefits. For example, the declaration of paternity makes it clear under Indiana law that Scottie is the grandchild of Scott Sr.'s mother. This status may be important under her will, for support obligations, under insurance policies designating "children" as beneficiaries, for employee survivor benefits, or for a host of ancillary legal obligations wholly apart from the intestacy laws. What if something happens to Christie Haas, so that she becomes unable to care for Scottie? In the vast majority of states, the family courts frequently look to the child's grandparents as the best substitute guardians. Second, unless we think that potential defendants have infinitely deep pockets, the addition of more plaintiffs to the wrongful death action risks dividing the pie further. Third, the majority seems to assume that the Indiana court was not conscientious in making its determination on paternity, in spite of Christi Haas' prompt action and the consequent ease with which the facts could be ascertained. Finally, support of a child is a financial and emotional burden for the extended family just as it would be for the father. This family, like any other, would have every reason to send a woman packing if she appeared on the doorstep and falsely insinuated that she had the child of a recently deceased son.

II.

It is unlikely in the extreme that the Indiana legislators who wrote Ind. Code § 29-1-2-7(b) were thinking about its effect on one-month gestation fetuses when they inserted the five-month limitation on claims. But whether or not they were, the application of that rule to the class of illegitimate children who are not born in time to bring the necessary paternity action for

intestate succession violates the Equal Protection Clause of the Constitution. Because the Commissioner of Social Security cannot incorporate an unconstitutional state statute in her test for benefits under § 402(d), and because Scottie has otherwise fully proven that he would be entitled to inherit for purposes of § 416(h)(2)(A) through his prompt securing of the decree of paternity, I would reverse and remand this case to the Commissioner for a determination of the benefits to which he is entitled.

Before POSNER, Chief Circuit Judge, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ILANA DIAMOND ROVNER, DIANE P. WOOD, and TERENCE T. EVANS, Circuit Judges.

ORDER

May 15, 1996

Rehearing en banc is granted and the panel decision vacated.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CHRISTI HAAS as Parent and Natural Guardian of SCOTT M. GLENN, II. Plaintiff,	)	
vs.	)	No. 1:94-CV-238
DONNA E. SHALALA, Secretary of Health and Human Services, Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court[1] on the Plaintiff's, Christi Haas as Parent and Natural Guardian of Scott M. Glenn, II ("Scott"), Brief in support of his Complaint for Review of the Defendant's, the Secretary or Health and Human Services' ("the Secretary") decision denying Scott child survivor's benefits, and his Motion to Remand for New and Additional Evidence, both filed January 4, 1995. On February 21, 1995, the Secretary filed her response brief. Plaintiff filed a reply brief on March 3, 1995. For the reasons stated hereafter, the Secretary's decision denying Scott's application for child survivor's benefits is AFFIRMED, and the Motion to Remand is DENIED.

I. FACTUAL AND PROCEDURAL HISTORY

On March 3, 1992, Scott M. Glenn ("Glenn"), the wage earner, died in an automobile accident. Eight months later, on November 6, 1992, Christi Haas ("Haas") gave birth to Scott. On December 8, 1992, Haas filed a Petition to Establish Paternity

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[1] Jurisdiction of the undersigned Magistrate Judge is based on 28 U.S.C. § 636(c), all parties consenting.

in the Allen Superior Court. Notice was provided to Cherie Glenn, the Personal Representative of Glenn's estate. On February 9, 1993, following a hearing in which testimony was received from Haas and Cherie Glenn, the Allen Superior Court issued an order establishing that Glenn was Scott's biological father.

On March 16, 1993, Scott filed an application for child survivor's benefits. That application was denied initially, and upon reconsideration. On October 25, 1993, Plaintiff filed a request for a hearing before an Administrative Law Judge ("ALJ"). In a decision issued on January 12, 1994, the ALJ found that Scott had failed to establish that he was Glenn's "child" as that term is defined in the Social Security Act, 42 U.S.C. § 416(h). Accordingly, the ALJ denied Scott's application for child survivor's benefits. On June 14, 1994, the Appeals Counsel declined to review the ALJ's decision, and it thereby became the final decision of the Secretary. Having exhausted his administrative remedies, Scott now seeks judicial review.

On September 9, 1994, and in connection with a wrongful death action filed by Glenn's estate, the Allen Superior Court found that Scott was Glenn's dependent child within the meaning of the Indiana Wrongful Death Statute, I.C. 34-1-1-2. Scott has now filed a Motion to Remand this action to the Secretary for consideration of this new evidence.

II. DISCUSSION

Plaintiff argues that the Secretary's determinations that he was not a child within the meaning of the statute is not supported by a substantial weight of the evidence. This Court's "review of the Secretary's findings is limited to determination of whether those findings are supported by substantial evidence based on the record as a whole." *Whitney v. Schweiker*, 695 F.2d 784, 786 (7th Cir. 1982); *See also, Roy v. Bowen*, 843 F.2d 998, 1001 (7th Cir. 1988); *Burnett v. Bowen*, 830 F.2d 998, 1001 (7th Cir. 1987). "Substantial evidence" has been described as "more than a mere scintilla." It means, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . ."

Anderson v. Bowen, 868 F.2d 921, 923 (7th Cir. 1989) (quoting, *Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See also, Roy*, 843 F.2d at 101; *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986). "The Secretary's conclusion's of law, however, are not entitled to the same deference — any errors of law must of course be reversed." *Hullum v. Sullivan*, 762 F.Supp. 1324, 1326 (N.D. Ill. 1991)(citing *Schaefer v. Heckler*, 792 F.2d 81, 84 (7th Cir. 1986).

The Social Security Act entitles an unmarried child of a deceased wage earner who dies fully insured to collect child's survivor's benefits if the claimant is considered a "child" of the wage earner and was "dependent" on the wage earner at the time of the wage earner's death. 42 U.S.C. § 402(d)1, *Hullum v. Sullivan*, 762 F.Supp. 1324, 1326 (N.D. Ill. 1991). The Act sets forth several ways by which a claimant can establish that he was a "dependant child." "The most common is for the [claimant's] mother to be . . . married to the covered wage earner." *Trammell v. Bowen*, 819 F.2d 167, 168 (7th Cir. 1987)(citing 42 U.S.C. § 402(d)(3)(A)). "A child adopted by the insured person is treated the same as his own child." *Id.* The statute also offers the applicant several ways, other than legitimate birth and adoption, to demonstrate "dependant child" status. They include:

—Eligibility to inherit property under intestate succession law, 42 U.S.C. § 416(h)(2)(A), *see Schaefer v. Heckler*, 792 F.2d 81 (7th Cir. 1986)

—Common law marriage of one's parents, defined as a technically deficient marriage ceremony, 42 U.S.C. § 416(h)(2)(B)

—The insured person's written acknowledgment of parentage, 42 U.S.C. § 416(h)(3)(C)(i)(I)

—A court order requiring the insured person 'to contribute to the support of the applicant because the applicant was his son or daughter,' 42 U.S.C. § 416(h)(3)(C)(i)(III)

—A determination by the Secretary that the insured person was the parent of and "was living with . . . the applicant [for

benefits] at the time of such insured individual died", 42 U.S.C. § 416(h)(3)(C)(ii)

—A determination by the Secretary that the insured person was the parent of and was 'contributing to the support of the applicant' for benefits when the insured person died, *Id.; see also Dubinski v. Bowen*, 808 F.2d 611 (7th Cir. 1986)

—A decree by a court that the insured person was the 'father of the applicant', provided that 'such . . . court decree . . . was made before the death of such insured individual', 42 U.S.C. § 416(h)(3)(C)(i)(II).

Trammell, 819 F.2d at 168. Scott, claims that he falls within scope of section 416(h)(3)(C)(i)(II) relating to court orders establishing paternity; and section 416(h)(2)(B) relating to the right to inherit through intestate succession.

A. Court Order Establishing Paternity

Scott claims that the February 9, 1993, court order establishing that Glenn was his father satisfies the requirements of Section 416(h)(3)(C)(i)(II). Under that provision a claimant establishes that he is a child entitled to survivor's benefits if he presents a court decree declaring that the insured was the father of the applicant, provided that "**such . . . court decree . . . was made before the death of the insured individual.**" *Id.* (emphasis added). The ALJ found that Scott did not satisfy the requirements of this section because the court order establishing that Glenn was his father was entered alter Glenn's death. Scott concedes that he has not satisfied the requirement that a paternity decree be entered before the insured's death. Nevertheless, Scott cites *Donaldson v. Secretary of Health and Human Services*, 567 F.Supp. 166, 168 (W.D.N.Y. 1983), for the proposition that the statute must be liberally construed to allow posthumous illegitimate children, like himself, to receive a court decree as soon as practicable after birth, rather than prior to the insured's death.

The holding of *Donaldson*, is inapposite for two reasons. First, in fashioning this exception, the *Donaldson* Court relied on 20

C.F.R. 404.355(c), which had "no requirement . . . that an order of filiation or paternity be entered during the lifetime of the father." 567 F. Supp. at 168. However, that regulation has since been amended to expressly require that a court order establishing paternity be entered before the insured's death. 20 C.F.R. 4O4.355(c) (1994). Thus, the reasoning of Donaldson, is no longer valid. Moreover, by creating such an exception the *Donaldson* Court completely ignored the plain language of the statute. As the Ninth Circuit has recently noted, "only a tortured reading of section 416(h) would allow [the Court] to come to such a conclusion. There is nothing in the statute to suggest that this eligibility requirement should be read flexibly." *Casserino v. Sullivan*, 921 F.2d 862, 863 (1990)(citing, *Trammell*, 819 F.2d at 169). "The Section explicitly states that qualification is dependent on the issuance of a paternity decree 'before death' of the insured." *Id.* In the present case, the Allen Superior Court's February 9, 1993, paternity order was issued eleven months after the insured's death. As a result, Scott cannot qualify for social security benefits under section 416(h)(3)(C)(i)(II). *Casserino*, 921 F.2d at 863; *Trammell*, 819 F.2d at 169.

B. Right to Inherit through Intestate Succession

Scott also claims that the February 9, 1993 paternity order established his right to inherit from Glenn through intestate succession. "In determining whether an applicant is the child . . . of a fully insured individual . . . the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which the insured individual . . . was domiciled at the time of his death." 42 U.S.C. § 416(h)(2)(A). Glenn was domiciled in Indiana at the time of his death. Indiana Code 29-1-2-7(b) provides:

> For the of inheritance (on the paternal side), to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if:
>
> (1) The paternity of the child has been established by law in a cause of action that is filed:

(A) During the father's lifetime; or

(B) Within five (5) months after the father's death; or

(2) The putative father marries the mother of the child and acknowledges the child to be his own.

I.C. 29-1-2-7(b). The ALJ found that Scott had not satisfied this requirement because, although a paternity action had been filed, it was filed more than five months after Glenn died.

Once again, Scott concedes that he has not complied with the statutory requirement. However, Scott characterizes the temporal limitations of the inheritance statute as a limitations period which must be pled as an affirmative defense, or be waived. Accordingly, he argues that he meets the requirements of I.C. 29-1-2-7(b)(1), because the representative of Glenn's estate never raised a statute of limitations defense in the underlying paternity action. Plaintiff's argument must fail.

Plaintiff's paternity action was filed pursuant to I.C. 31-6-6.1 *et. seq*, which has an express statute of limitations requiring that actions be brought by a mother within two years of the child's birth, or by a child before his twentieth birthday, except that no action may be filed later than 5 months after the putative father's death. I.C. 31-6-6.1.6. Plaintiff is correct that the limitations period for paternity actions is not jurisdictional, but rather is an affirmative defense which may be waived. *T.C.S. v. Ellis*, 576 N.E.2d 633, 634 (1991). Nevertheless, "the time limitation contained in I.C. 31-6-6.1-6 [is] inapplicable to statutes relating to proof of heirship and inheritance rights . . . [citations omitted]. The only time limitation affecting establishment of paternity for heirship and inheritance purposes is contained in I.C. 29-1-2-7(b)." *Woods v. Harris*, 600 N.E.2d 163, 164 (Ind. App. 1992). Under that section "[i]f a paternity action is filed on behalf of a child after the five-month period, the child may not inherit from its father's estate, even if the action is successful. [Of Course,] the action may still be prosecuted and, if successful, the child may still claim other attendant benefits," such as the proceeds from an insurance policy, or money damages in a wrongful death

action. *S.V. v. Estate of Bellamy*, 579 N.E.2d 144, 148 (Ind. App. 1991). Thus, the time limitation in I.C. 29-1-2-7(b) operates as a non-claim provision, not a statute of limitations, and therefore the concept of waiver is inapplicable. Scott, having failed to file his paternity action within five months of Glenn's death, is not entitled to inherit through intestate succession, and therefore is not entitled to child survivor's benefits under this provision.

C. Constitutionality of the Act

Scott's final argument is that I.C. 29-1-2-7(b) as incorporated into the Social Security Act is unconstitutional as applied to him, because it violates his right to equal protection of the law. Scott claims that if he must establish paternity within five months of his fathers death, then the Indiana statute creates an insurmountable burden for posthumous illegitimate children to obtain social security benefits — one that does not exist for legitimate children and other classes of illegitimate children. Supreme Court and Seventh Circuit jurisprudence oblige this Court to find otherwise.

First, it is clear that I.C. 29-1-2-7(b), standing alone, is constitutional. That conclusion is compelled by the case of *Lalli v. Lalli*, 439 U.S. 259 (1978), in which the Supreme Court upheld as constitutional a New York statute that required an illegitimate child to obtain a court order establishing paternity prior to the putative father's death in order to inherit from his father through intestate succession. *Lalli*, found that the New York inheritance statute was substantially related to the State's interest in providing for the orderly disposition of property at death, and therefore, it did not violate the equal protection clause of the Fourteenth Amendment. *Id.* at 271. Like New York's statute, Indiana's statute is designed to facilitate the orderly administration of the decedent's estate. *Estate of Bellamy*, 579 N.E.2d at 144. In fact, the Indiana statute is actually less restrictive than the New York statute upheld in *Lalli*. Consequently, *Lalli* forecloses Scott's constitutional attack on the Indiana inheritance statute.

Scott's attack on the intestacy statute as incorporated into the Social Security Act is guided by the Seventh Circuit's decision, in *Trammell*, 819 F.2d at 170. In *Trammel*, the Seventh Circuit upheld the constitutionality of Section 416(h)(3)(C)(i)(II), which provides that "child" status can be shown by a court decree declaring paternity only if that decree has been obtained before the death of the father. *Id.* The Court began its analysis by noting that "[v]iewed as a system, the Social Security Act's provisions defining 'child' are constitutional." *Id.* (citing *Mathews v. Lucas*, 427 U.S. 495 (1976)). "*Trammell*, further instructs that a provision (here the [Indiana] intestacy laws) requiring that a showing of paternity be made during the lifetime of the father [or within five months after death], 'as one small part of a complex and generally sensible system, could be unconstitutional only if irrational.'" *Hullum v. Sullivan*, 762 F.Supp. 1324, 1330-31 (N.D.Ill. 1991)(quoting, *Trammell* 819 F.2d at 170. However, the Indiana inheritance statute, as incorporated into the Social Security Act "cannot be said to be irrational in light of the constitutional framework of the act as a whole. Nor can it be said to be unconstitutional . . . in light of *Lalli* and *Trammell*."[2] *Id.* at 1331 (finding that the Social Security Act's incorporation of Wisconsin intestate succession law, which requires a child born out of wedlock to establish paternity prior to the putative fathers death, not irrational and therefore constitutional).

For all of the foregoing reasons, the ALJ's determination that Scott did not qualify for child survivor's benefits is supported by

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[2] Plaintiff relies on the case of *Handley v. Schweiker*, 697 F.2d 999, 1001 (11th Cir. 1983) to support his argument that I.C. 29-1-2-7(b) violates the equal protection clause of the fourteenth amendment. While *Handley* did hold that Alabama's intestate succession statute, which required that a court order establishing paternity be entered during the father's lifetime, was unconstitutional, that case is not dispositive because it is in direct conflict with the law of this Circuit as established in *Trammell*, 819 F.2d at 169.

a substantial weight of the evidence and the prevailing law of this circuit. Accordingly, the Secretary's decision must be affirmed.

III. MOTION TO REMAND

Scott asserts that the Allen Superior Court's September 9, 1994 order, which found Scott to be Glenn's dependant child pursuant to the Indiana Wrongful Death Act, constitutes new evidence that provides a basis to remand this action to the Secretary. A Court may remand the matter and order the Secretary to take additional evidence where the claimant shows there is new and material evidence and that there is good cause for failing to present the evidence in a prior proceeding. 42 U.S.C. § 405(g). Plaintiff bears the burden of proving that the additional evidence is indeed new, that it is material, and that he had good cause for not introducing it in an earlier administrative proceeding. *Waite*, 819 F.2d at 1361.

Scott's additional evidence does not warrant a remand because it is not material. In order for evidence to be material it must be "relevant and probative," *Szubak v. Secretary of Health & Human Services*, 745 F.2d 831, 833 (3rd Cir. 1984), *per curium*, and there must be "a reasonable possibility that the new evidence would have changed the outcome the Secretary's determination." *Sears v. Bowen*, 840 F.2d 394, 400 (7th Cir. 1988).

Scott contends that the Allen Superior Court's order of September 9, 1994, is material because it establishes his right to inherit from Glenn's estate through intestate succession. The Court disagrees. In that order the Allen Superior Court only held that Scott was a dependant child within the meaning of the Indiana Wrongful Death Act, I.C. 34-1-1-2, and therefore was entitled to benefit from the wrongful death action being pursued as a result of Glenn's death. However, that Plaintiff was able to establish dependency pursuant to the Wrongful Death Act is of no consequence because, as discussed earlier, the only statute affecting establishment of paternity for heirship and inheritance purpose is I.C. 29-1-2-7(b). *Woods v. Harris*, 600 N.E.2d 163, 164 (Ind. App. 1992). If the child cannot satisfy the paternity requirements of that statute, he may not inherit from his father's

estate. *Estate of Bellamy*, 579 N.E.2d at 148. The ALJ found that the critical shortcoming of Scott's attempt to satisfy paternity under I.C. 29-1-2-7(b), was that Scott's paternity action was filed more than 5 months after Glenn's death. Clearly, the September 9, 1994, court order does not cure that defect, nor does it establish a right to inherit under any other provision of the statute. So, this "new" evidence provides no basis upon which the ALJ could find that Scott was entitled to child survivor's benefits, and therefore, remanding this case to consider Scott's additional evidence would be inappropriate.

IV. CONCLUSION

For the reasons stated above the Secretary's decision to deny Plaintiff child survivor's benefits is AFFIRMED. Plaintiff's Motion to Remand is DENIED.

Enter this 17th day of March, 1995.

/S/ Roger B. Cosbey

Roger B. Cosbey
United States Magistrate Judge

[Filed June 14, 1994]

Department of Health
& Human Services
Refer to: S3GC5
315-92-4238

Social Security Administration
Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Christi Haas
for Scott Glenn, II
5401 Old Dover Blvd., #2
Fort Wayne, IN 46835

Dear Ms. Haas:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on January 12,1994.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case.

The Appeals council agrees with the finding of the Administrative Law Judge that Scott Glenn, II is not the child of the deceased wage earner under section 216(h)(2)(A) of the Social Security Act under Indiana State law based on the court order establishing paternity in an action filed more than five months after the wage earner's death because, based on State law, upon the passage of five months after the putative father's death, the right to establish legal paternity **for inheritance purposes** is extinguished. Further support for this conclusion is found in *S.V. v. Estate of James A. Bellamy*, 579 N.E. 2d 144 (Ind. 2 Dis. 1991) cited by your representative which was addressed by the Administrative Law Judge in his decision. The Appeals Council further agrees that the court was not, by its language in *Bellamy*, *supra*, adjudicating the child's entitlement to Social Security benefits independent of the requirements of the Social Security Act or of the Social Security Administration nor would a State court have the jurisdiction to do so. Although your representative has submitted a copy of a hearing decision in which, making the same arguments, his client prevailed, the decision of an Administrative Law Judge in this other case has no precedential value with respect to other cases.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if

you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Larry K. Banks
Administrative Appeals Judge

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Scott M. Glenn II	Child's Insurance Benefits (Survivors)
(Claimant)	(XREF: 305-76-5277)
Scott M. Glenn (Dec) (Wage Earner)	315-92-4238 (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing filed on October 25, 1993. Both the claimant's mother, Christi Haas, and her attorney waived the right to an oral hearing and requested that a decision be rendered based on the evidence of record (Exhibit 14). The claimant's mother was represented by Ivan A. Lebamoff, Attorney-At-Law. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits and the brief submitted on behalf of the claimant (Exhibit 13).

ISSUES

The issue before the Administrative Law Judge is whether Scott M. Glenn, II, is entitled to Child's Insurance Benefits on the record of the deceased wage earner, Scott M. Glenn. Specifically at issue is whether he is the "child" of the wage earner within the meaning of the Social Security Act.

STATEMENT OF LAW AND REGULATIONS

Section 202(d)(1) of the Social Security Act provides, as pertinent herein, for the payment of insurance benefits to a child (as defined in section 216(e) of the Act) of an individual who dies a fully or currently insured individual if the child has filed application for Child's Insurance Benefits, is unmarried and under the age of 18, and was dependent on such individual at the time of his death.

Section 216(e) of the Act provides, as pertinent herein, that the term "child" means the child or legally adopted child of an individual.

EVALUATION OF THE EVIDENCE

The record establishes that the claimant was born November 6, 1992 (Exhibit 6). The issue is whether the claimant is the "child" of the deceased wage earner.

Section 216(h)(2)(A) of the Act provides that in determining whether the applicant is the child of the insured individual (Scott M. Glenn), the Secretary is to apply the law as would be applied by the state in which the insured died domiciled (Indiana) in determining the devolution of intestate personal property. And that applicants who are found to have the same status relative to taking intestate personal property as a child shall be deemed a child for purposes of entitlement to benefits.

Under Indiana State law, a child acquires the status of a "child" of the wage earner if, in relevant part, the paternity of the child is established for inheritance purposes by law in a cause of action that was filed during the father's lifetime or within five months after the putative father's death. See I.C. 29-1-2-7(b); *S.V. v. Estate of James A. Bellamy*, 579 N.E. 2d 144 (Ind. App. 2 Dist. 1991).

The applicant obtained an order from the Allen County Superior Court (Indiana) on February 9, 1993, decreeing Scott M. Glenn (the insured) to be the father of the claimant. However, the petition seeking an order of paternity was not filed during the

insured's lifetime, or within five months of his death on March 3, 1992.

The claimant nonetheless argues that he should be determined the insured's child for purposes of entitlement to Social Security benefits relying upon language contained in a footnote in *Bellamy*, *Supra*. That reliance is misplaced. In *Bellamy*, the court upheld a lower court's ruling that a child who had not filed an action to establish paternity within five months of the putative father's death, was not entitled to inherit. The court went on to rule that the five month statute of limitations did not, however, bar an action to establish paternity for purposes other than establishing the child's right of inheritance. By way of a footnote, the court offered examples of other benefits to which a child *may* be entitled, including Social Security Survivor benefits.

The claimant is not entitled to inherit intestate property from the insured's estate and, therefore, is not a "child" as defined under Section 216(e) of the Act. The language relied upon by the claimant in *Bellamy* is mere *dicta* and does not, nor was it intended to, establish entitlement to Social Security benefits independent of the Social Security Act.

Section 216(h)(2)(B) of the Act provides, as pertinent herein, that if an applicant is not a child of the insured individual under (A), such applicant shall nevertheless be deemed to be the child of such individual if the insured individual and the child's mother went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment, would have been a valid marriage. The insured and the claimant's mother did not marry, nor go through a marriage ceremony (Exhibits 5 and 8).

Section 216(h)(3)(C) of the Act provides, as pertinent herein, that an applicant who is the child of an insured individual but does not qualify as his child under either of the above provisions may still qualify if the individual had acknowledged in writing that the applicant is his child, had been ordered by a court to contribute to the applicant's support, had been decreed by the court to be the father of the child before the death of the insured, or is shown by

other satisfactory evidence to have been the father of the applicant and was either living with or contributing to the support of the applicant when he died.

In this case, there was no court decree stating that the claimant was the child of the worker nor was there a court order for support before the death of the wage earner (Exhibits 5 and 11). There was also no written acknowledgement by the wage earner of his paternity of the child (Exhibits 5 and 8).

From the record, it appears that there was acceptable "other satisfactory evidence" which shows the wage earner as the father of the child. However, the record also confirms that the wage earner was neither living with the claimant, the claimant's mother, or contributing regularly and substantially to the support of the child or the child's mother at the time of death (Exhibits 4, 5, 8 and 11). Therefore, the claimant does not meet the definition of a "child" under the Social Security law to be entitled to Child's Insurance Benefits.

Accordingly, under the provisions of the Social Security law, the Administrative Law Judge is constrained to find that the claimant, Scott M. Glenn, II, is not entitled to Child's survivors Benefits as the child of the deceased wage earner, Scott M. Glenn.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. Scott M. Glenn, II is not the "child" of the wage earner under Indiana State law as required by section 216(h)(2)(A) of the Social Security Act.

2. Scott M. Glenn, II is not the "child" of the wage earner pursuant to section 216(h) (2) (B) of the Social Security Act as his mother and the wage earner never went through a marriage ceremony.

3. Scott M. Glenn, II is not the "child" of the wage earner pursuant to section 216(h) (3) (C) of the Social Security

Act as the evidence of record does not establish that the wage earner was ever decreed by a court to be his father within five months of the putative father's death as required by Indiana State law, was ever ordered by a court to contribute to his support, or ever clearly acknowledged him in writing before his death. Furthermore, the evidence of record does not establish that the wage earner was either living with the child or contributing regularly and substantially to the child's support at the time of death, although the evidence is sufficient to support a finding that the wage earner was the claimant's biological father. However, both requirements must be met before there can be a finding that the claimant is the "child" of the wage earner.

DECISION

It is the decision of the Administrative Law Judge that Scott M. Glenn, II is not entitled to Child's Insurance Benefits on the record of the wage earner for which application was filed on Scott M. Glenn, II's behalf on March 16, 1993.

/s/Steven J. Neary
Steven J. Neary
Administrative Law Judge

January 12, 1994
Date

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SPECIAL DETERMINATION

SOCIAL SECURITY ADMINISTRATION	OFFICE Fort Wayne, IN DO459
NAME OF WAGE-EARNER OR S/E PERSON Scott M. Glenn	SOCIAL SECURITY NO. 315-92-4238
NAME OF CLAIMANT (If not W/E) Scott M. Glenn II	RELATIONSHIP OF CLAIMANT Alleged Son

ISSUE:
Is Scott M. Glenn II the son of Scott M. Glenn within the meaning of Secs. 202(d), 216(h)(2), 216(h)(3); Regs. 404.350-.366 of the Social Security Act, as amended? This determination is necessary if surviving child's benefits can be paid to Scott Glenn II on the record of Scott Glenn.

FACTS:
Scott Glenn died on March 3, 1992. Scott Glenn II was born on November 6, 1992. Christi Haas filed for surviving child's benefits for Scott Glenn II on March 16, 1993. She submitted a paternity decree showing Scott as the father of Scott II. It was completed February 9, 1993. The birth certificate shows the father as "not stated". A Form 2519 was obtained from Ms. Haas. She answered "no" to all questions except the one asking if the father had ever told others orally that he was the father. A question was written on the back asking if Scott had been living with or contributing to the support of Ms. Haas at the time of his death. He was not. The parents never married.

DETERMINATION:
It is determined that Scott Glenn II is not the son of Scott Glenn within the meaning of Secs. 202(d), 216(e), 216(h)(2), 216(h)(3); Regs. 404.350-.366 of the Social Security Act, as amended.

There are a number of ways in which an illegitimate child can be entitled on a parent's record. None apply here. The birth certificate doesn't show relationship, the parents didn't marry, the father didn't live with or contribute to the support of the mother, and he didn't claim Scott as his son in writing. An oral admission is not sufficient to entitle a child in a death claim. Although a paternity decree can be used in death claims, it must be filed within 5 months of the number holder's death. Scott Glenn II wasn't even born yet when the 5-month period had elapsed. Although it does seem evident that Scott Glenn is in reality the father of Scott Glenn II, there is no provision of the law under which this child can draw benefits on his record.

AUTHORITY:
Secs. 202(d), (e), 216(h)(2), 216(h)(3)

DETERMINATION MADE BY
/s/David R. Pfeltz

DATE
May 19, 1993

TITLE
Claims Representative

APPROVED BY

DATE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 15, 1996

Before
Hon. Richard A. Posner, Chief Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge
Hon. Diane P. Wood, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

CHRISTI HAAS, as parent and natural guardian of SCOTT M. GLENN, II, *Plaintiff-Appellant*,	)	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
	)	No. 94 C 238
No. 95-1918 v.	)	Roger B. Cosbey, *Magistrate Judge*.
SHIRLEY S. CHATER, Commissioner of Social Security *Defendant-Appellee*.	)	

ORDER

Rehearing en banc is granted and the panel decision vacated.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: June 18, 1996 No. 95-1918

Before:

Honorable Richard A. Posner, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable William J. Bauer, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge
Honorable Diane P. Wood, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

CHRISTI HAAS, as Parent and Natural Guardian of SCOTT M. GLENN, II,

Plaintiff-Appellant,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division — No. 94 C 238 — Roger B. Cosbey, *Magistrate Judge*

ORDER

The judgment of the District Court is AFFIRMED, with costs, by an equally divided court, in accordance with the decision of this court entered on June 17, 1996.

STATUTORY PROVISIONS

42 U.S.C. § 402

§ 402. Old-age and survivors insurance benefit payments

* * * *

(d) Child's insurance benefits

* * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and —

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

* * * *

42 U.S.C. § 416

§ 416. Additional definitions

For the purposes of this subchapter —

* * * *

(e) Child

The term "child" means (1) the child or legally adopted child of an individual . . . .

* * * *

(h) Determination of family status

* * * *

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * * *

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his or her son or daughter,

(II) had been decreed by a court to be the mother or father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter, and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

* * * *

Ind. Code § 29-1-2-7

29-1-2-7 Illegitimate children; inheritance

Sec. 7. (a) For the purpose of inheritance (on the maternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's mother were married to the child's father at the time of the child's birth, so that the child and the child's issue shall inherit from the child's mother and from the child's maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from the child. The child shall also be treated as if the child's mother were married to the child's father at the time of the child's birth, for the purpose of determining homestead rights and the making of family allowances.

(b) For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if:

(1) the paternity of the child has been established by law in a cause of action that is filed:

(A) during the father's lifetime; or

(B) within five (5) months after the father's death; or

(2) the putative father marries the mother of the child and acknowledges the child to be his own.

(c) The testimony of the mother may be received in evidence to establish such paternity and acknowledgment, but no judgment shall be made upon the evidence of the mother alone. The evidence of the mother must be supported by corroborative evidence or circumstances.

(d) If paternity is established as described in this section, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, so that the child and the child's issue shall inherit from the child's father and from the child's paternal kindred, both descendants and collateral, in all degrees, and they may inherit from the child. The child shall also be treated as if the child's father were married to the child's mother at the time of the child's birth, for the purpose of determining homestead rights and the making of family allowances.

Supreme Court, U.S.
FILED
JAN 15 1997
CLERK

(2)

No. 96-602

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHRISTI HAAS, PARENT AND NATURAL GUARDIAN OF SCOTT M. GLENN, II, PETITIONER

v.

SHIRLEY CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Social Security Act provides that an illegitimate child is eligible for survivor's benefits upon the death of an insured parent if, *inter alia*, the child would be entitled to inherit personal property under "such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured individual * * * was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Petitioner's child is not eligible to inherit under applicable Indiana law, Ind. Code § 29-1-2-7(b) (Michie 1989), because no action to establish paternity was brought on the child's behalf within five months of the insured individual's death. The question presented is whether the Social Security Act unconstitutionally limits the ability of illegitimate children to obtain survivor's benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-602

CHRISTI HAAS, PARENT AND NATURAL GUARDIAN OF SCOTT M. GLENN, II, PETITIONER

v.

SHIRLEY CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the en banc court of appeals, affirming the judgment of the district court by an equally divided court (Pet. App. 1a), is unpublished, but the decision is noted at 89 F.3d 838 (Table). The opinion of a panel of the court of appeals is reported at 79 F.3d 559, together with an order of the en banc court vacating the panel's decision (Pet. App. 2a-26a, 47a). The orders of the district court (Pet. App. 27a-36a), the Appeals Council of the Department of Health and Human Services (Pet. App. 37a-39a), and the administrative law judge (Pet. App. 40a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1996. Pet. App. 48a. On September 5, 1996, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including October 16, 1996. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Social Security Act, unmarried minor children of a deceased individual who was insured under the Act may receive survivor's benefits if they were "dependent upon such individual" prior to his death. 42 U.S.C. 402(d)(1)(C). A child who is legitimate or legally adopted by the insured is deemed dependent and thus is entitled to benefits. 42 U.S.C. 402(d)(3). An illegitimate child can establish dependency by several means. First, the child may show that the insured was his or her parent and was living with the child or contributing to his or her support at the time of the insured's death. 42 U.S.C. 416(h)(3)(C)(ii). Second, the child may show that his or her parents went through a purported marriage ceremony, but that their marriage was invalid because of a legal impediment. 42 U.S.C. 416(h)(2)(B). Third, the child may show that the insured, prior to his death, had (a) acknowledged the child as his son or daughter in writing, (b) been decreed by a court to be the child's parent, or (c) been ordered by a court to contribute to the support of the child on the basis of parenthood. 42 U.S.C. 416(h)(3)(C)(i). Section 402(d)(3) provides that a child who meets any of the tests in Sections 416(h)(2)(B) and 416(h)(3) "shall be deemed to be the legitimate child of such individual."

In addition, an illegitimate child can qualify for benefits without meeting any of the foregoing tests for showing dependency if the child is entitled to inherit personal property under "such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured individual * * * was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). An illegitimate child who meets the standard of Section 416(h)(2)(A) is also deemed to be legitimate and therefore dependent. See *Mathews* v. *Lucas*, 427 U.S. 495, 514-515 n.17 (1976); see also *Jimenez* v. *Weinberger*, 417 U.S. 628, 631 n.2 (1974).

In *Mathews* v. *Lucas*, *supra*, the Court upheld the constitutionality of 42 U.S.C. 416(h)(2)(A) and other provisions of the Social Security Act dealing with an illegitimate child's right to survivor's benefits. The Court noted that the reason for the various criteria was "to determin[e] * * * dependency", so that the Act would "provid[e] only for those children for whom the loss of the parent is an immediate source of * * * need." 427 U.S. at 507. The Court specifically explained the rationale for Section 416(h)(2)(A):

> [W]here state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an

> "illegitimate" child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.

427 U.S. at 514-515 (footnote omitted). In short, Congress incorporated state law of intestacy into Section 416(h)(2)(A) because it believed that body of state law, together with the other eligibility criteria discussed above (*e.g.*, a written acknowledgment of paternity or a paternity decree), constituted a "narrow set of objective and apparently reasonable indicators" of a "likelihood of actual support" at the time of the parent's death. 427 U.S. at 516; see also *id.* at 503, 510.

2. Scott M. Glenn, a wage-earner insured under the Social Security Act, died in an automobile accident in March 1992, eight months before petitioner Christi Haas gave birth to a child out of wedlock. One month after the child's birth (and thus nine months after the wage-earner's death), petitioner sought from an Indiana state court an order establishing that Mr. Glenn was the father of her child. Mr. Glenn's mother, who was the personal representative of the estate, testified in support of petitioner's claim. The court determined that Mr. Glenn was the father of petitioner's child. Subsequently, the child, as the only minor kin of a decedent who left no widow, was found to be entitled under state law to the proceeds of a wrongful-death action filed by Mr. Glenn's estate. Pet. App. 3a-4a, 27a-28a.

Petitioner also filed an application on behalf of her child seeking social security survivor's benefits based on Mr. Glenn's account. Pet. App. 28a. The administrative law judge (ALJ) denied benefits, because petitioner's child did not qualify as a dependent child under any of the alternatives provided by Section

416(h)(2) or (3). In rejecting eligibility under Section 416(h)(2)(A), which looks to state law governing intestate succession, the ALJ relied on Section 29-1-2-7(b) of the Indiana Code. That statute permits a child who is born out of wedlock to inherit from his father only if

> (1) The paternity of the child has been established by law in a cause of action that is filed:
>
> (A) During the father's lifetime; or
>
> (B) Within five (5) months after the father's death; or
>
> (2) The putative father marries the mother of the child and acknowledges the child to be his own.

Ind. Code § 29-1-2-7(b) (Michie 1989); Pet. App. 51a-52a.[1] Because petitioner did not file her paternity action until nine months after Mr. Glenn's death, the ALJ concluded that her child was not eligible to take from Mr. Glenn by intestate succession, and thus was also ineligible for social security benefits under Section 402(h)(2)(A). See Pet. App. 40a-44a.

The Appeals Council of the Department of Health and Human Services agreed with the ALJ that petitioner's child "is not the child of the deceased wage

---

[1] The five-month period for bringing a paternity action under Indiana law applies only if the purpose of the action is to determine inheritance rights. Even after five months, Indiana allows a paternity action to be brought for purposes other than inheritance, such as the decree in the present case establishing the right of petitioner's child to bring a wrongful death action. See *S.V.* v. *Estate of Bellamy*, 579 N.E.2d 144, 148-149 (Ind. Ct. App. 1991).

earner under * * * the Social Security Act," and it accordingly denied review. Pet. App. 37a-38a.

3. Petitioner sought review of the Secretary's decision by filing a civil action in the United States District Court for the Northern District of Indiana, alleging that the application of Indiana's law to deny her child benefits under the Social Security Act violated the child's equal protection rights. Pet. 5. The district court concluded that the Indiana statute barred petitioner's claim, that the state statute is constitutional under *Lalli* v. *Lalli*, 439 U.S. 259 (1978), and that *Mathews* v. *Lucas*, *supra*, establishes that the Social Security Act is constitutional insofar as that Act incorporates the state statute. Pet. App. 33a-34a.

4. A divided panel of the court of appeals affirmed. Pet. App. 1a-26a. The court first concluded that the five-month time limit, as a matter of Indiana law, may not be waived by the decedent's estate. *Id.* at 4a-7a. The court also concluded that the five-month time limit should not be tolled while petitioner's child was *in utero*, because petitioner failed to make that argument, which in any event had been rejected by an intermediate appellate state court in *S.V.* v. *Estate of Bellamy*, 579 N.E.2d 144 (Ind. Ct. App. 1991). See Pet. App. 6a-7a.

Turning to petitioner's constitutional attack, the court noted that in *Lalli* v. *Lalli*, *supra*, this Court concluded that "even tighter limitations" on the ability of an illegitimate child to inherit were justified by "[t]he interest in protecting decedents' estates against phony claims and in winding up these estates promptly." Pet. App. 7a-8a. The court adverted to some lower court decisions that have declined to apply *Lalli* when "state law makes it impossible in the cir-

cumstances to establish paternity," but the court concluded that

> there is no impossibility here; [petitioner] knew that she was pregnant, and she had five months to sue. She must also have known that since she neither had been married to the father nor lived with him, his paternity might be questioned. All she had to do was *file* * * *. The filing would not be burdensome, and it would provide notice to the estate.

Id. at 8a. The court acknowledged that recent decisions of this Court have struck down some statutory deadlines that barred illegitimate children from seeking support from their natural fathers. *Id.* at 11a-12a (citing *Mills* v. *Habluetzel*, 456 U.S. 91 (1982), *Pickett* v. *Brown*, 462 U.S. 1 (1983), and *Clark* v. *Jeter*, 486 U.S. 456 (1988)). The court explained that those cases neither questioned *Lalli*, nor implicated the State's interest in winding up estates swiftly. Pet. App. 12a. In light of *Lalli*, the court concluded, petitioner could not have succeeded in having the Indiana statute declared unconstitutional in a state-court heirship action. See also *id* at 11a.

The court then concluded that the Social Security Act's incorporation of the Indiana statute is also constitutional. The court explained that the purpose of the Act is not to establish paternity, but "to replace the support that the child would have received from his father had the father not died." Pet. App. 9a. "Consistent with this purpose, the sections of the [Act] that define the entitlements of children born out of wedlock, * * * have been crafted * * * to determine * * * paternity plus likelihood of support." *Ibid.* Thus, "Congress has decided that, [when] other

routes to demonstrating the likelihood of support" are closed, "if the child's state was willing to allow the child to take by intestacy from the putative father [then that] is enough evidence that the putative father would have supported the child to entitle the child to benefits in lieu of that support taken away by death." *Id.* at 10a. In the court's view, this Court's decision in *Mathews* v. *Lucas*, *supra*, established that "Congress was not required to go further."

Judge Diane P. Wood dissented. Pet. App. 13a-26a. She first observed that, as a matter of state law, the Indiana courts might toll the five-month limit during the time petitioner's child was *in utero*. *Id.* at 16a. To the extent they did not do so, Judge Wood believed, then "*Mills*, *Pickett*, and *Clark*, not *Lalli*, provide the analytical approach for * * * constitutional analysis." *Id.* at 229. Under those post-*Lalli* cases, she concluded, the Indiana statute is unconstitutional. *Id.* at 23a-25a. "Because the Commissioner of Social Security cannot incorporate an unconstitutional state statute in her test for benefits," Judge Wood would have remanded the case for a calculation and award of Social Security benefits to petitioner's child. *Id.* at 26a.

5. The court of appeals, sitting en banc, vacated the decision of the panel and set the case for rehearing. Pet. App. 26a. Upon en banc rehearing of the merits, the unpublished order of the district court was affirmed without opinion by an equally divided court. *Id.* at 1a.

ARGUMENT

Petitioner renews her contention that her child was improperly denied benefits under the Social Security Act. The district court correctly resolved that

issue against petitioner. In affirming by an equally divided court, the court of appeals created neither precedent nor a live circuit conflict. Accordingly, further review is not warranted.

1. While petitioner strongly relies on Judge Wood's dissent from the now-vacated panel decision (Pet. 10, 13, 15), and suggests that half of the en banc court "presumably" agreed with Judge Wood's position (Pet. 15), petitioner's basic claim finds little support in Judge Wood's opinion. Petitioner's principal claim is that *the Social Security Act*'s incorporation of Indiana law is unconstitutional, so that the Court "need not even consider the constitutionality of the Indiana statute, standing alone." Pet. 17 n.12; see also Pet. i (question presented). Judge Wood (and, presumably, at least some of the judges who voted to reverse the district court's judgment), by contrast, advanced the theory that *the Indiana statute* is unconstitutional, because it is purportedly inconsistent with *Mills* v. *Habluetzel*, 456 U.S. 91 (1982); *Pickett* v. *Brown*, 462 U.S. 1 (1983), and *Clark* v. *Jeter*, 486 U.S. 456 (1988).[2] Not only did Judge Wood fail to analyze or discuss the question presented by petitioner—whether the federal statute is unconstitutional if the state statute is valid—but Judge Wood's analysis of the Indiana statute is at odds with this Court's cases.

In *Trimble* v. *Gordon*, 430 U.S. 762 (1977), this Court struck down a state statute that completely barred illegitimate children from inheriting from

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[2] Indeed, as demonstrated by the concluding passage of Judge Wood's opinion, she believed that the denial of benefits was unlawful only "[b]ecause the Commissioner of Social Security cannot incorporate an unconstitutional state statute in her test for benefits under § 402(d)." Pet. App. 26a.

their natural fathers when the father died intestate. The Court recognized (*id.* at 770-771), however, that States providing a legal framework for the inheritance rights of illegitimate children have some flexibility to choose "a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." The Court also specifically "reaffirm[ed] th[e] view" that "judicial deference is appropriate when the challenged statute involves the substantial state interest in providing for the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents." *Id.* at 767 n.12 (internal quotation marks omitted).

The Court applied that principle one year after its decision in *Trimble*, when it upheld a New York statute that required paternity to be established during the life of the putative father. See *Lalli* v. *Lalli*, 439 U.S. 259 (1978). Speaking for the controlling plurality, Justice Powell, who had authored *Trimble*, concluded that the New York rule substantially advanced the important state purpose "to provide for the just and orderly disposition of property at death," *id.* at 268, by assuring that all potential claimants to an estate can be timely served with process and by preventing spurious claims that can be difficult to disprove after the putative father's death, *id.* at 268-271. Justice Powell also recognized that a State's use of categorical rules will sometimes deny valuable property to some illegitimate children who, under a case-by-case approach, might establish their entitlement consistently with the broad statutory purposes. Indeed, the Court upheld the New York scheme on the ground that, as a general matter, it substantially served important state interests, even though those

interests were not served in some cases, since "few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results." *Id.* at 273 (plurality opinion).[3]

Nothing in *Mills* v. *Habluetzel*, *supra*, and its progeny, casts doubt on the continuing vitality of *Lalli*. Those cases involved proceedings in which illegitimate children sought support from the putative fathers, but were barred by state statutes of limitations (ranging from one to six years from the child's birth) that effectively shielded the fathers from their support obligations. The Court concluded that those limits unreasonably burdened the ability of the children to seek support from their fathers, while not significantly advancing the State's interest in preventing stale or fraudulent claims, especially given the ready availability of highly-probative genetic evidence. See *Clark*, 486 U.S. at 463-465.[4] This case, however, unlike *Mills* and its progeny, involves a limitation tied to the death of the putative father, not the birth of the child. Accordingly, none of those

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[3] Then-Justice Rehnquist and Justice Blackmun would have upheld the New York statute on an even more deferential standard, thus providing the majority for the judgment of the Court. *Lalli*, 439 U.S. at 276-277.

[4] Apparently recognizing that the death of the putative father can eliminate an important source of genetic materials or other objective proof of paternity, petitioner relies on a newspaper article to suggest, in a footnote, that comparably reliable results might be obtained in some cases "by testing both paternal grandparents." Pet. 14 n. 9. Petitioner does not suggest that anything properly in the record of this case could enable this Court to assess the nature or reliability of such new techniques, or their proper role in deciding the constitutional validity of Indiana's law.

cases involved the State's interest in winding up estates swiftly—*i.e.*, the interest that supported the result in *Lalli*—nor did they confront the peculiar dangers of staleness and fraud that arise when the putative father no longer can effectively controvert the mother's allegation. For those reasons, and notwithstanding the post-*Lalli* decisions on which Judge Wood relied, this Court has continued to recognize the validity of "statutory provisions that have an evident and substantial relation to the [government's] interest in providing for the orderly and just distribution of a decedent's property at death." *Reed* v. *Campbell*, 476 U.S. 852, 855 (1986) (citing *Lalli*).

Because *Lalli* would preclude petitioner's child from successfully setting aside the provisions of Section 29-1-2-7(b) of the Indiana Code, the child could not maintain a claim under that statute, and thus be declared Mr. Glenn's heir, in the Indiana courts. Petitioner does not even attempt to offer an argument to the contrary.[5]

2. Petitioner concentrates instead on arguing that, irrespective of the validity *vel non* of Indiana's law, the Social Security Act's incorporation of that law is unconstitutional, because "the federal government cannot bootstrap on such a uniquely local interest to justify the constitutionality of a federal statute." Pet. 17. The constitutionality of the federal statute, however, is established by *Mathews* v. *Lucas*, 427 U.S. 495 (1976), a case in which this Court concluded that the criteria outlined by the Social Security Act are permissibly and reasonably related to the

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[5] Indeed, petitioner acknowledges (Pet. 16-17 n.12) that it would be necessary to overrule or limit *Lalli* in order for a challenge to the Indiana statute to succeed.

likelihood of dependency at the time of the wage earner's death—the core concern of the federal enactment. See *id.* at 507-516.[6] Petitioner does not address or distinguish *Mathews*, other than to endorse a passing suggestion by Judge Wood to the effect that the case "did not address whether the application of the presumption of dependency based on intestate succession was constitutional." Pet. 7 (citing Pet. App. 17a). But the passage of *Mathews* cited by Judge Wood merely reflects this Court's decision not to revisit the district court's *factual* conclusion that the Lucas children could not inherit under the applicable Rhode Island law. See 427 U.S. at 501 ("None of these factual matters is at issue here."). Indeed, contrary to petitioner's assertion, the result in *Mathews* was informed by the Court's review of *all* statutory factors that Congress thought relevant to the question of dependency, see *id.* at 510-516, and it specifically embraced the factor at issue here—*i.e.*, whether the "state['s] intestacy law provides that a child may take personal property from a father's estate." *Id.* at 514-515.

In the end, petitioner's failure to confront the holding of *Mathews* appears to be simply a by-product of her belief that *Mills* and its progeny have displaced all other authority in cases involving claims to "support" (as opposed to inheritance) by illegitimate children. See Pet. 10, 13. None of the cases on which petitioner relies, however, purported to cast doubt on the continuing validity of *Mathews*; to the contrary, *Mills* itself cited *Mathews* as authoritative. *Mills*,

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[6] In this case, because the putative father died only one month after conception, any likelihood of actual dependency would have been speculative at the time of death.

456 U.S. at 99 n.5; see also *Clark*, 486 U.S. at 461; *Pickett*, 462 U.S. at 7-8. Moreover, while the Social Security Act aims to replace the "support" that death has taken from a child who was reasonably likely to have been dependent upon the wage earner at the time of his death, that "support" is like any ordinary bequest or inheritance in a critical respect: it is a claim against a third-party (the deceased wage earner's Social Security account) that is triggered by a parent's death. Indeed, as Chief Judge Posner noted (Pet. App. 4a-5a), the facts that the putative father is no longer alive, and that other parties with ready access to probative evidence ordinarily have no incentive to safeguard the fiscal interests of the Social Security program, pose dangers of collusion and fraud that mirror those that support the constitutionality of state inheritance statutes.[7] In these circumstances, it is difficult to justify petitioner's facile assumption that *Mills* and its progeny control the analysis, much less that those cases overruled *sub silentio* a controlling decision of this Court.

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[7] In some cases, as was true in *Lawrence* v. *Chater*, 116 S. Ct. 604 (1996), allowing the claim of an illegitimate child would reduce the amount of benefits received by the wage-earner's widow and dependent children. See Brief for Respondent at 6 in No. 94-9323, (noting that decedent's widow and her child contested ALJ's determination that putative child of decedent could share in the benefits of decedent's account). In such circumstances, prolonging the time during which other claimants may come forward, beyond that allowed by the state law of intestacy, could defeat the reasonable expectations of the wage-earner's heirs that they alone will share in the property attributable to the decedent, including the proceeds of his Social Security account.

3. Finally, petitioner contends that the decision below conflicts with the decisions of the Eleventh Circuit in *Daniels* v. *Sullivan*, 979 F.2d 1516 (1992), and *Handley* v. *Schweiker*, 697 F.2d 999 (1983). While *Daniels* and *Handley* indicate that this case might be resolved differently by the Eleventh Circuit, but cf. *Orsini* v. *Sullivan*, 903 F.2d 1393 (1990), the court of appeals did not issue an opinion in this case. Its unpublished order merely disposes of the particular dispute between the particular parties, and it has no precedential value. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 234 n.7 (1987); *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972). As this Court explained in *Neil*, "[i]t is, indeed, the settled practice in such [a] case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the case is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed." 409 U.S. at 192, quoting *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1869). Because the Seventh Circuit did not issue any decision on the merits, there is no disagreement among the appellate courts that warrants this Court's review. [8]

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[8] Petitioner cites three cases where this Court granted review of a court of appeals decision affirming by an equally divided court. Two of those cases, however, came to this Court on appeal, and the Court accordingly believed itself obligated to exercise jurisdiction. See *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279 (1985); *Frisby* v. *Schultz*, 487 U.S. 474, 478-479 (1988) (later granting certiorari to avoid merits challenge to appellate jurisdiction). In only one case, see *Hill* v. *Lockhart*, 474 U.S. 52, 53 (1985), did the Court grant certiorari

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997

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to review a judgment rendered by an equally divided court of appeals. In our view, the paucity of precedent for the course sought by petitioner at least indicates that the Court engages in such discretionary review only in the most exceptional circumstances—which we do not believe are present here.

Supreme Court, U.S.
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No. 96-602

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

CHRISTI HAAS, as parent and natural guardian of SCOTT M. GLENN, II,
Petitioner,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

1. The government does not retreat from its previous admission that "the issues raised by this case are important,"[1] nor does it deny that these issues are recurring. The federal courts have been called upon repeatedly to adjudicate the constitutionality of conditioning an illegitimate child's eligibility for Social Security survivors' benefits on the requirement that the child sue to establish paternity before (or shortly after) birth. Pet. 21-22. As long as untimely deaths continue to claim expectant fathers before they have the chance to legitimate, acknowledge, or even learn about the unborn children they leave behind, children like Scotty Glenn will grow up not only without their fathers, but without the government support meant to replace that which their fathers would have otherwise provided. Denied a reasonable opportunity to establish their entitlement to that needed support, these children will remain, as Chief Judge Posner put it, locked in a box to which "[o]nly the Supreme Court possesses the key." Pet. App. 13a.

2. The government seeks to avoid review by arguing that this case is "controlled" by the plurality decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), while simultaneously depicting petitioner as claiming that the case is "controlled" by *Mills v. Habluetzel*, 456 U.S. 91 (1982). Opp. 14. But as we previously explained, neither *Lalli* nor *Mills* squarely addresses the question presented here. The divided panel of the Seventh Circuit, and presumably the equally divided *en banc* court, reached sharply divergent positions on whether *Lalli* or *Mills* is more pertinent to this case. That is precisely why, as we put it in the petition, "[t]his Court's guidance is needed to clarify which of its two lines of authority is applicable in these circumstances." Pet. 10.

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[1] *See* Pet. 9 (quoting Affidavit of Frank A. Rosenfeld, Attorney, United States Department of Justice, supporting Commissioner's Motion for an Extension of Time to Respond to Petition for Rehearing *En Banc*, at 2).

Lalli, in contrast to this case, involved the inheritance rights of an adult illegitimate son who had ample opportunity to satisfy the statutory requirement by establishing paternity before his father died; it did not involve a child who was not even born until months after his father's death. Pet. 16. That difference alone is enough to raise a serious question as to whether *Lalli* even *applies*, much less *controls*. *See* Pet. 16. Indeed, as the panel majority noted, *Lalli* itself might well have been decided differently under the facts presented in this case. Pet. App. 8a. Moreover, a statute that requires an unwed pregnant teenager to file a paternity suit months before her suddenly deceased partner's baby is even born raises all of the concerns that troubled this Court in *Mills* — concerns that the *Lalli* plurality never had to consider.[2] As the Eleventh Circuit realized, "the *Lalli* reasoning does not lead to the *Lalli* result" where the facts are so different that the procedural inconvenience imposed on the adult son in *Lalli* becomes a total exclusion for children born shortly before or after their fathers' deaths. *Handley v. Schweiker*, 697 F.2d 999, 1004-05 (11th Cir. 1983). For all of these reasons, *Lalli* does not, as the government contends, conclusively establish the constitutionality of applying the Indiana intestacy statute to posthumous illegitimate children, much less the constitutionality of incorporating that statute into the Social Security Act.[3]

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[2] The government fails to mention, much less address, the concerns this Court expressed in *Mills*, *Pickett*, and *Clark* regarding the financial difficulties, emotional strain, social opprobrium, and confusion that "often attend the birth of an illegitimate child" — concerns that led the Court to conclude that it was unreasonable to require a mother to file a paternity suit within a short time (even several years) after the child's birth. *Mills*, 456 U.S. at 100; *Pickett v. Brown*, 462 U.S. 1, 12-13 (1983); *Clark v. Jeter*, 486 U.S. 456, 463 (1988).

[3] The government contends that the petition "acknowledge[d] that it would be necessary to overrule or limit *Lalli* in order for a challenge to the Indiana statute to succeed." Opp. 12 n.5 (citing Pet. 16-17 n.12). To the contrary, we maintained that this Court need not overrule *Lalli* to rule in our favor, although it "might appropriately use this case as a

Moreover, the plurality opinion in *Lalli* rested largely on "the State's interest in the orderly disposition of a decedent's property at death." *Lalli*, 439 U.S. at 268 & n.6 (noting that the state's interest in settling estates distinguished the statute in *Lalli* from the illegitimacy-based classifications that the Court had previously declared unconstitutional). But that state interest is conspicuously lacking in the Social Security Act: the federal government has no interest in the disposition of estates, which is a matter "particularly within the competence of the individual states." *Id.* at 265; *accord* Pet. App. 8a. Once again, the plurality's reasoning in *Lalli* simply does not apply to the facts presented here.

3. The government fails to identify a single federal interest sufficient to support the Act's incorporation of Indiana's five-month limitation on establishing paternity. Relying on *Lalli*, the government suggests that "the facts that the putative father is no longer alive, and that other parties . . . have no incentive to safeguard the fiscal interests of the Social Security program, pose dangers of collusion and fraud." Opp. 14.[4] This interest, however, does not support incorporation for at least three reasons.

First, a purported federal interest in preventing fraud bears no relationship to a requirement that paternity actions be brought within five months of the wage earner's death. The same alleged problems — the wage earner's inability to contest the claim and the asserted lack of other parties with incentive to do so — are present whether two months or two years have passed since the

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vehicle" for doing so. Pet. 16-17 n.12.

[4] There are serious doubts whether the "fraud and collusion" interest asserted by the government would have been sufficient, by itself, to uphold the statute challenged in *Lalli*. Justice Powell's plurality opinion in *Lalli* upheld the challenged statute based not only on the state's interest in preventing fraud and collusion, but also, as we noted above, on the state's interest in promptly and definitively winding up estates without the risk that straggling claimants would appear later. *Lalli*, 439 U.S. at 271.

wage earner's demise. *See Mills*, 456 U.S. at 101 (finding it unlikely that "the passage of 12 months will appreciably increase the likelihood of fraudulent claims"). Indeed, the same problems would exist if the wage earner were alive but comatose. *Cf. Handley*, 697 F.2d 999.

Second, as we explained in the petition, any federal interest in preventing fraud and collusion is seriously undermined by the Act's incorporation of other state intestacy statutes that do *not* impose any time limits on an illegitimate child's ability to establish paternity for inheritance purposes. *See* Pet. 15 n.10 (citing statutes). This undercuts the government's apparent claim that its different treatment of illegitimate children is "substantially related to an important governmental objective." *Clark*, 486 U.S. 456, 461 (1988); *see id.* at 464 (state's asserted interest in avoiding fraud was undermined by its use of longer limitations periods to establish paternity in other contexts); *Mills*, 456 U.S. at 104-05 (O'Connor, J., concurring) (same).[5] If the Social Security Act's goals are adequately served by its incorporation of state intestacy statutes that impose no time limit whatever on an illegitimate child's ability to establish paternity, it is difficult to see how the incorporation of Indiana's five-month limitation period is substantially related to the same interests or carefully tuned to alternative methods of furthering those interests.[6]

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[5] For the same reasons, the Court should not give significant weight to the government's footnote (Opp. 14 n.7) suggesting that the incorporation of Indiana's five-month limitation could be supported by a federal interest in the timely resolution of benefit claims. This assertion is similarly undermined by the fact that many states' inheritance statutes impose no time limit at all on a child's ability to establish paternity. *See* Pet. 15 n.10 (citing intestacy statutes).

[6] The widespread availability of "increasingly sophisticated" genetic paternity tests, *cf. Clark*, 486 U.S. at 465, further confirms that the statute could be tailored more narrowly to the asserted federal interest in avoiding fraud and collusion. For instance, Social Security benefit claims could be (and are, in some cases) determined by genetic testing of the putative father's grandparents. *See, e.g., Krenz-Buchanan v.*

Third, there is no merit to the government's suggestion (Opp. 14) that the Act's incorporation of Indiana's five-month limitation period can be justified because "other parties with ready access to probative evidence [of paternity] ordinarily have no incentive" to challenge the child's claim. To the contrary, there will often be other parties interested in challenging such claims. For one, as the government itself points out (Opp. 14 n.7), other dependent children of the wage earner might be at risk of having their survivors' benefits reduced by the claim of an additional, illegitimate child. For another, when the wage earner leaves behind an estate above and beyond his survivors' benefits, those who would otherwise inherit from the estate have an interest in challenging claims that would reduce their distributive share. And other concerns could also provide an incentive to challenge paternity claims. The wage-earner's parents, for example, might not wish to be legally recognized as the child's grandparents. There is thus no indication that other parties lack incentive to challenge posthumous paternity claims, and certainly no showing that such an alleged lack justifies a five-month limitation period on establishing paternity.

4. The government suggests that *Mathews v. Lucas,* 427 U.S. 495 (1976), foreclosed all further constitutional challenges to the Social Security Act's incorporation of state intestacy laws for determining benefit eligibility. Opp. 12-13. The only issue before the Court in *Mathews,* however, was the constitutionality of requiring proof of dependency for some children while providing presumptions of dependency for others. 427 U.S. at 497-98. The *Mathews* Court considered the intestacy law provision of the Act only to determine whether eligibility for

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Shalala, 884 F. Supp. 324, 325 (W.D. Wisc. 1995); *Outwater v. Secretary of Health and Human Services,* 894 F. Supp. 1114, 1118 (E.D. Mich. 1995). And as Judge Wald noted in a recent D.C. Circuit case, "Congress itself has acknowledged that the accuracy of genetic testing has 'eliminate[d] the rationale' for time limits on the establishment of paternity." *Miller v. Christopher*, 96 F.3d 1467, 1475 (D.C. Cir. 1996) (Wald, J., concurring).

intestate inheritance was a reasonable proxy for dependency. *Id.* at 514-15. There was thus no occasion for the Court to consider whether conditioning benefit eligibility on state laws that impose too-short periods for establishing paternity is itself a violation of equal protection. Judge Wood was therefore correct: this issue was "not before the Court" in *Mathews*. Pet. App. 17a; *see also* Pet. 7.

Even if the government were correct that *Mathews* speaks to this issue, certiorari should still be granted. As Judge Wood pointed out in her dissent, the Court in *Mathews* "did not indicate with precision what lesser level of scrutiny was actually being used." Pet. App. 17a. *Mathews* itself only says that it applied "less than strictest scrutiny." 427 U.S. at 510. Although some cases (*e.g.*, *Clark*, 486 U.S. at 461) cite *Mathews* as applying intermediate scrutiny, it is clear that *Mathews* actually applied a form of rationality review. *E.g.*, *Mathews*, 427 U.S. at 509 ("the statutory classifications . . . are *reasonably related* to the likelihood of dependency at death") (emphasis added). The *Mathews* Court justified the Act's disparate treatment of illegitimate children on the ground of "administrative convenience" (*id.*), but this Court has consistently held that "administrative convenience" cannot support a classification subject to intermediate scrutiny.[7] This Court's later cases (*Mills*, *Pickett*, and *Clark*) establish quite clearly that intermediate scrutiny, not rational basis, is the standard that governs claims of discrimination against illegitimate children. These holdings cannot be squared with *Mathews* and its "administrative convenience" rationale.[8]

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[7] *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

[8] The government's other principal case, *Lalli*, suffers from a similar problem. The plurality in *Lalli* required only that the statute's relation to the state's asserted interests not be so "tenuous that it lacks the *rationality* contemplated by the 14th Amendment." 439 U.S. at 273

5. Finally, the government fails to address the conflict between the decision below and the Eleventh Circuit's decisions in *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992), and *Handley v. Schweiker*, 697 F.2d 999, except to concede that "*Daniels* and *Handley* indicate that this case might be resolved differently by the Eleventh Circuit." Opp. 15.

The government instead suggests that the Seventh Circuit's affirmance by an equally divided *en banc* court has no precedential value and therefore creates no conflict warranting certiorari. However, as we showed in the petition (at 21 n.15), the Seventh Circuit's equally divided *en banc* affirmance creates no impediment to certiorari. While the government rejoins that this Court has granted review to judgments rendered by equally divided courts of appeals only "in the most exceptional circumstances" (Opp. 16 n.8), that is clearly not the case. This Court has granted certiorari on numerous occasions to review judgments of equally divided *en banc* courts of appeals. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *see also Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988). Similarly, equally divided *en banc* judgments have proven no obstacle to this Court in noting probable appellate jurisdiction. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985); *Frisby*, 487 U.S. at 478-79. This is hardly the "paucity" of cases the government describes. Opp. 16 n.8. Indeed, given that *en banc* review is an extraordinary procedure in and of itself, *see* Fed. R. App. P. 35(a) (*en banc* review "ordinarily will not be ordered"), and that an even division among *en banc* judges is

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(emphasis added). As with *Mathews*, this "rationality" standard cannot be squared with *Mills*, *Pickett*, and *Clark*, which require that a classification on grounds of illegitimacy be "substantially related to an important governmental objective." *E.g., Clark*, 486 U.S. at 461.

rarer still, this Court has granted review in a significant number of such cases.

If anything, the fact that the judges of the Seventh Circuit divided six-to-six indicates the need for this Court's review. As then-Justice Rehnquist wrote in a case presenting a similar situation,

> The sharp split amongst the judges who considered this case below demonstrates that our past precedents do not conclusively address the issues central to this dispute. In the same manner that we expect considered and deliberate treatment of cases by these courts, we have a concomitant responsibility to aid them where confusion or uncertainty in the law prevails. . . .
>
> * * *
>
> The mathematically even division of the Court of Appeals on the petition for rehearing *en banc* gives some indication of the divergence of judicial views which may be expected of conscientious judges on difficult constitutional questions such as this. Our views may be no less divergent, and no less persuasive to one another, than were the views of the eight judges of the Court of Appeals. But believing as I do that we cannot under our Rules properly leave this important question of law in its present state, I would grant the petition for certiorari.

Ratchford v. Gay Lib, 434 U.S. 1080, 1082, 1085-86 (1978) (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting). The same holds true here: This Court's "past precedents do not conclusively address the issues central to this dispute," and "[t]he mathematically even division of the Court of Appeals" indicates both the importance of the issue presented and the need for this Court's review.

Certiorari should be granted.

Respectfully submitted,

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